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SUPREME COURT  
STATE OF WASHINGTON  
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No. 103199-8

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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LESCHI PARTNERS, LLC,

Plaintiff/Counterdefendant,

v.

FC LESCHI, LLC, dba BLUWATER BISTRO,

Respondent,

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ZACHARY FLEET; BART EVANS AND FC LESCHI, LLC,  
D/B/A BLUWATER BISTRO-LESCHI,

Respondents,

v.

HARTFORD FIRE INSURANCE COMPANY; SENTINEL  
INSURANCE COMPANY LTD.; a foreign insurance  
company, part of the HARTFORD FIRE & CASUALTY  
GROUP,

Appellants.

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ANSWER TO PETITION FOR REVIEW

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## **I. IDENTITY OF RESPONDENTS**

Respondents Zachary Fleet, Bart Evans, and FC Leschi, LLC (BluWater) ask the Court to deny the petition for review filed by Hartford Fire Insurance Company and Sentinel Insurance Company (Hartford/Sentinel). If the Court grants review of any of Hartford/Sentinel's issues, BluWater requests the Court also grant review of Division I's ruling on the "care, custody, or control" provision of the policy.

## **II. COURT OF APPEALS DECISION**

It is apparent neither BluWater nor Hartford/Sentinel was entirely happy with Division I's decision. Nevertheless, any reasonable reader of the opinion must recognize Division I's meticulous and thoughtful examination of a voluminous record, and the valuable guidance to the parties and the trial court. The unpublished opinion does not break legal ground, take shortcuts, or endorse any "anti-insurance" attitude. The best defense of the Division I's work comes from reading the decision, itself.



### **Property Coverages**

1. Division I held the electrical panel and relevant fans were part of the “building.” Although the policy generally does not cover the building, Division I recognized there is an exception for property that qualifies as “business personal property,” including “tenant improvements and betterments.” Op. at 2, 11–12.

2. Division I held that whether BaDa (the previous tenant) installed the electrical panel as a tenant improvement or betterment remained a genuine issue of fact. Op. at 13. Therefore, Division I reversed summary judgment establishing coverage for the panel under the “tenant improvements and betterment” provision or under the so-called additional coverages. Op. at 2–3.

3. Division I also concluded, in contrast to “tenant improvements and betterments,” the “care, custody, or control” provision did not encompass property that is part of the

building. Op. at 15. Division I reversed summary judgment establishing this coverage. *Id.*

4. Alternatively, Division I found a genuine dispute about whether the panel was in BluWater’s care, custody, or control. Op. at 15–16.

5. According to Division I, the existence of “molten material” coverage turned on whether the damage to the panel was a covered loss, which remained in dispute. Op. at 17.

6. Division I reversed summary judgment granting coverage on extra-expense coverage. Op. at 17–18, 21.

7. Division I reversed the trial court’s holding that the fans and ducts were covered as “tenant improvements and betterments,” finding genuine issue of material fact, and therefore reversing the grant of summary judgment in the amount of \$9,371.25. Op. at 20–21, 41.

**Repair Amount**

8. Division I affirmed the ruling that Hartford/Sentinel owed the cost of repair, or \$274,617. Op. at 19. As Division I explained, Hartford/Sentinel did not dispute this amount but, rather, on appeal noted that the trial court did not state whether the amount was payable directly to BluWater (under property coverage) or in resolution of the landlord's claim (under liability coverage). *Id.* In keeping with Hartford/Sentinel's concern, Division I affirmed the amount only. *Id.*

9. Division I reversed trial court's finding on claim-handling regulations related to the property coverages, based largely on its reversal of the partial summary judgment on coverage of the panel. Op. at 27–30 (addressing WAC 284-30-330(1), -350(1), -370).

### **Business Income Benefits**

10. Division I affirmed the ruling that Hartford/Sentinel owed at least \$64,635 in business income

loss. Op. at 19–20, 41. Hartford/Sentinel had agreed to this amount and, therefore, Division I held Hartford/Sentinel waived any challenge to it. Op. at 19–20. The remainder of BluWater’s business-income claim remained for trial. *Id.*

### **Liability Coverage**

11. Division I held Hartford/Sentinel waived any argument on the trial court’s determination that it violated WAC 284-30-360(3) and WAC 284-30-360(4). Op. at 26. As Division I reasoned, the failure to brief an assignment of error is deemed a waiver. Op. at 26.

12. Division I noted Hartford/Sentinel did not dispute on appeal that BluWater incurred expenses in having to defend the landlord’s claim, constituting harm under the Consumer Protection Act (CPA). Op. at 27. For these reasons, Division I concluded: “Hartford has not shown that a genuine issue of material fact remains as to BluWater’s CPA claim based on

Hartford's failure to investigate the landlord's allegations of negligence against BluWater." Op. at 3, 27.

13. Division I affirmed the trial court's ruling that Hartford/Sentinel committed bad faith when it failed to investigate the landlord's negligence claim against BluWater. Op. at 3, 24–25.

14. Division I noted that Hartford/Sentinel did not dispute that it was liable for the costs and fees related to BluWater having to defend against the landlord. Op. at 32.

#### **Attorney Fees and Costs**

15. Division I disagreed with BluWater's position that fees did not need to be segregated, based on the reversal on certain coverages. Op. at 33. Because a genuine issue of material fact remained on the coverage status of several items of property, it was premature to determine if the costs and attorney fees should or could be segregated. Op. at 34.

16. Because Division I reversed the imposition of attorney fees and costs, it did not need to reach Hartford/Sentinel's challenge of the application of authority supporting attorney fees. Op. at 34 n.17.

17. Because the judgment was not on appeal, Division I disagreed with Hartford/Sentinel's argument that \$172,000 it already paid BluWater's counsel should have been excised from the trial court's judgment. Division I noted that record suggested Hartford/Sentinel had not paid the amount at the time of the October 28, 2022 summary-judgment order. Op. at 34 n.18.

### **Discovery**

18. Division I affirmed the trial court's finding that Hartford/Sentinel committed discovery violations. Op. at 3. Division I concluded Hartford /Sentinel waived any assignment of error relating to the claim that BluWater's CR 30(b)(6) notice was too broad. Op. at 36–37. Hartford/Sentinel's entire

appellate argument was contained in a single sentence in its brief. “A review of BluWater’s CR 30(b)(6) notice indicates its incredible breadth.” Op. at 36.

19. Division I affirmed the order requiring Hartford/Sentinel to designate an upper-level executive for deposition. Op. at 38. Division I recognized the trial court granted this relief only “after Hartford designated a lower-level representative who did not have the knowledge or attempted to obtain the information requested.” *Id.*

20. Division I reversed the part of the trial court’s sanctions that it found relinquished the court’s discretion to BluWater’s counsel. Op. at 3, 41.

21. Division I affirmed only the sanctions (a) requiring Hartford/Sentinel to designate an upper-level executive under CR 30(b)(6); (b) requiring Hartford/Sentinel to deposit \$50,000 to fund potential monetary sanctions. Op. at 37–38, 41. The other sanctions were reversed. Op. at 42.

### **Request for Cross Summary Judgment**

22. Division I declined to grant cross summary judgment to Hartford/Sentinel on issues of breach of contract, bad faith, and CPA violations, Op. at 9 n.9, because Hartford/Sentinel had noted a cross motion for a date after the trial court granted BluWater's motion for partial summary judgment; the trial court never ruled on the cross motion; and Hartford/Sentinel had not included its request for summary judgment in its appellate briefing. *See id.*

### **Reconsideration Before Trial Court**

23. Division I did not address the motion for reconsideration because Hartford/Sentinel did not brief it on appeal. Op. at 42 n.22.

## **III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW**

### **Hartford/Sentinel's Issues**



1. Where the evidence does not answer as a matter of law whether the prior tenant installed an electrical panel and fans, did Division I correctly hold there is a genuine dispute about whether such property is covered under the policy? Yes.

2. Where it is undisputed Hartford/Sentinel violated claims-handling regulations, did Division I correctly hold that Hartford/Sentinel committed bad faith or violated the CPA as a matter of law? Yes.

3. Where Hartford/Sentinel's produced an unprepared low-level employee and failed to appear on several CR 30(b)(6) topics, did Division I correctly uphold the trial court's order that Hartford/Sentinel produce an upper-level executive to testify? Yes.

**BluWater's Issue (If the Court Grants Review)**

4. Where a term is undefined in the policy—namely, with respect to the “care, custody, or control” coverage—and

susceptible to two reasonable conclusions, did Division I err in resolving the ambiguity against coverage? Yes.

#### **IV. STATEMENT OF THE CASE**

##### **A. Factual Background**

Respondents own and operate BluWater Bistro.

BluWater leases its building from Leschi Partners, LLC.

BluWater purchased a “Spectrum Business Owner’s Policy.”

CP 679–860. The policy includes both property and liability coverages. *Id.* It was an “all risk” policy that covered all direct physical loss of or damage to Covered Property unless an exclusion applied. CP 710–11.

The policy covers “Business Personal Property.” *Id.*

Business Personal Property includes “Property of others that is in your care, custody, or control,” but the policy does not define this provision. *Id.* Business Personal Property also includes “Tenant Improvements and Betterments” which the policy defines as follows:

“Tenant Improvements and Betterments” means, fixtures, alterations, installations or additions made a part of the Building you occupy but do not own and that you cannot legally remove; and

- a. Which are made at your expense; or
- b. That you acquired from the prior tenant at your expense.

CP 734.

On August 26, 2021, an electrical fire, located entirely within BluWater’s leased space, caused damage and closed the restaurant. CP 1176, 1247, 3503. That same day, BluWater notified Hartford/Sentinel of the fire. CP 3521.

BluWater’s landlord took the position that BluWater owed the cost of repairs. CP 616. As early as October 18, 2021, Hartford/Sentinel knew the landlord was seeking more than \$200,000 from BluWater. CP 1147. But Hartford/Sentinel did not explain policy benefits that would protect BluWater or otherwise give BluWater reasonable assistance.

On November 9, 2021, the landlord’s attorney sent BluWater a letter threatening litigation and explaining why Hartford/Sentinel owed BluWater both property and liability coverages. CP 647–60. On November 19, 2021, BluWater forwarded this letter to Hartford/Sentinel and implored Hartford/Sentinel to “provide coverage for the damages caused by the fire, and to protect our company from all exposures resulting therefrom.” CP 646.

Hartford/Sentinel did not reasonably communicate, investigate, or assist BluWater. Hartford/Sentinel treated the policy’s liability coverage like a hot potato, throwing it back on BluWater’s lap a month later: “Please advise if you would like us to also open a claim under your general liability policy.” CP 636.

True to its word, BluWater’s landlord on January 11, 2022, sued BluWater. CP 1, 3–5. BluWater then pleaded legal claims against Hartford/Sentinel for (1) a declaratory judgment;

(2) breach of contract; (3) violation of the insurer's duty of good faith; (4) negligent claims handling; (5) violation of the Insurance Fair Conduct Act (IFCA), RCW 48.30.015; (6) violation of the CPA, RCW 19.86.090; and (7) constructive fraud. CP 7, 440–46. The legal claims against Hartford/Sentinel are what this appeal is about.

With respect to the landlord's claims against BluWater—which were in the same King County Superior Court case—it took six months after learning of the landlord's threat of litigation, and months after BluWater was sued, for Hartford/Sentinel to finally acknowledge its duty to defend BluWater under the liability provisions of the policy. CP 2749.

## **B. Procedural History**

### **1. Discovery**

On May 9, 2022, BluWater moved to compel depositions and to overrule Hartford/Sentinel's objections to discovery requests and CR 30(b)(6) deposition topics. CP 450. The Court

granted BluWater’s motion and ordered Hartford/Sentinel to produce responsive documents before the CR 30(b)(6) deposition. CP 2833.

The CR 30(b)(6) Hartford/Sentinel deposition was delayed, and the court ordered the deposition to occur on September 23, 2022. CP 4722; *see also* CP 4723–30. A week before the scheduled deposition, Hartford/Sentinel declared (without bringing a motion for a protective order) it would not produce a witness on Topics 21–27. CP 4739–43. In addition, the witnesses designated to testify on other topics were unprepared and claimed to lack personal knowledge on several topics. *See* Resp. Br. at 31–33 (citing examples).

After the deposition, BluWater moved for sanctions. CP 4600. Weighing the *Burnet* factors, the trial court found Hartford/Sentinel “systematically acted in bad faith to thwart a fair resolution of this case on the merits.” CP 5151. The trial court did not impose one of the “harsher” sanctions, *see Burnet*

*v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), or grant the \$500,000 sanctions BluWater requested. *Id.* The trial court ordered Hartford/Sentinel to provide for a deposition of a fully prepared, upper-level executive (although the trial court did not dictate which), and it established a process to address future violations, if any. CP 5154.

## **2. Summary Judgments**

The trial court entered two summary-judgment orders. CP 3119–3123, 5145–5149.

On June 27, 2022, the trial court granted partial summary judgment finding that Hartford/Sentinel breached the policy by misinterpreting key coverages and withholding payment. CP 3121. The trial court also ruled that Hartford/Sentinel violated the following claims-handling regulations: WAC 284-30-330(1), (2), (3), (4), (7), (13), WAC 284-30-350(1), (2), WAC 284-30-360(3), (4), and WAC 284-30-370. CP 3122.

And the trial court held that Hartford/Sentinel committed insurance bad faith. CP 3123.

The trial court denied reconsideration on July 19, 2022. CP 3176–77.

On October 28, 2022—after allowing a CR 56(f) continuance, CP 4405—the trial court granted partial summary judgment establishing the following amounts: \$91,855.00 (business personal property); \$64,635.00 (business income loss); \$9,371.25 (repairs to fans and ducts); \$35,220.58 (costs of investigation and experts to date); and \$378,852.50 (attorney fees). CP 5148. The trial court also granted partial summary judgment establishing that Hartford/Sentinel violated WAC 284-30-330(1), -350, and -370. CP 5148.

### **3. Court of Appeals**

The Court of Appeals heard oral argument on November 1, 2023, and issued its opinion on April 29, 2024.



## **V. ARGUMENT WHY REVIEW SHOULD BE DENIED**

Rule of Appellate Procedure 13.4(b) provides limited grounds for review by this Court:

- (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). Hartford/Sentinel rely on subsections (1) and (2), but neither of these narrow grounds for review applies here.

**A. Hartford/Sentinel fails to show that Division I’s unpublished, fact-focused holding regarding tenant improvements and betterments warrants review.<sup>1</sup>**

Hartford/Sentinel asks this Court to set aside core insurance-interpretation principles. Review should be denied for two reasons: (1) the policy defines the terms of the policy, not Hartford/Sentinel’s cherry-picked “common law” cases that average purchasers of insurance know nothing about; and (2) the case of *Forman v. Columbia Theaters Company*—a case that has nothing to do with insurance—does not preclude a finding that there is a genuine dispute as to whether BluWater acquired electrical equipment and fans from BaDa. 20 Wn.2d 685, 148 P.2d 951 (1944).

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<sup>1</sup> BluWater contended the trial court correctly granted summary judgment relating to the Tenant Improvements and Betterments coverage. Division I found genuine fact issues precluded summary judgment. Nevertheless, BluWater recognizes that Supreme Court review generally is not available to second-guess an appellate court’s analysis of the factual record.

**1. Hartford/Sentinel's position is completely at odds with insurance interpretation principles.**

Hartford/Sentinel persists in arguing that anything that is part of the building can never be covered under this policy. Pet. at 10. It also persists in asking that the “common law on chattels” be grafted on this policy. *Id.* at 14. Application of universally accepted insurance principles forecloses Hartford/Sentinel's argument. And, importantly, Hartford/Sentinel's proprietary internal procedures directly show that Division I's reading of the policy is the same one that Hartford/Sentinel intended. CP 5517 (sealed).

It is improper to use “common law” to negate the intention expressed in the policy. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 881, 784 P.2d 507 (1990) (“legal technical meanings have never trumped the common perception of the common man.”). Hartford invites the Court to use a 1944 case to ascertain the meaning of a term that is defined in the policy, but legal meanings are irrelevant to modern insurance

policy interpretation. *Id.* at 881–82. If Hartford/Sentinel desired to limit the “business personal property” coverage as proposed, the onus was on it to clearly state so on the face of the policy. *Id.* at 887.

Hartford/Sentinel claims the electrical panel and fans are part of the building, and the building was excluded from coverage. Pet. at 15. However, Tenant Improvements include items that are made part of the building, *i.e.*, here, the electrical panel and fans: “fixtures, alterations, installations or additions *made a part of the Building* you occupy but do not own and that you cannot legally remove.” CP 734. Division I reached the only conclusion permitted under Washington law.

## **2. There is no conflict with *Forman*.**

BluWater addresses *Forman* only out of an abundance of caution. *Forman* did not involve insurance contract interpretation for coverage. In *Forman*, a landlord sold to his tenant specific property which was enumerated in a bill of sale.

20 Wn.2d.at 689–89. The sale document listed out specific items, including “Robert Morten Organ,” and “piles, Lobby Display, Bill-Boards, *etc.*” *Id.* (emphasis added). The lease agreement, however, required the tenant to “leave on said premises all permanent improvements.” *Id.*

The tenant eventually ended their lease and removed original electrical wiring and conduits, fire doors, and frames for automatic fire shutters, which were designed for use in a theater building. *Id.* The landlord sued for the return of that property.

At trial, the tenant argued the property passed through the sale documents by the term “etc.,” but it was determined that the property belonged to the landlord. *Id.* The Supreme Court affirmed because the testimony showed the disputed property was unique to the specific purposes of the building and did not bear any relationship to the listed property preceding “etc.” in the bill of sale. *Id.* at 686, 690. In this context, the Court found

it was “highly improbable” that property would have passed through the word “etc.,” and thus the disputed property was a permanent improvement.

Our case is dissimilar. BluWater does not claim that the electrical panel and fans passed through “etc.”. Additionally, the description of the property BluWater acquired in the purchase and sale agreement does not specifically list any items. *See Op.* at 13 (quoting purchase and sale agreement).

If, as Hartford/Sentinel contends, the “common law of chattels” governed the interpretation of the policy, then under *Forman*, Division I is still correct that the issue should be decided by a jury: “If the various leases had been silent as to the ownership of the items in dispute, then the ownership would necessarily have to be determined . . . .” *Id.* at 691.

Dispositive evidence one way or another<sup>2</sup> was not before Division I, and thus it should be decided by a jury Op. at 13 (“Neither party presented any evidence to the superior court as to who installed the electrical panel.”).

Division I’s decision is not in conflict with *Forman* or any other law. RAP 13.4(b)(1), (2).

**B. Division I correctly upheld the trial court’s ruling on CPA violations.**

Review on this issue is not warranted because Hartford/Sentinel waived its arguments regarding its violations of claims-handling regulations WAC 284-30-360(2), (3) and (4), and Division I’s decision does not conflict with any published decision. RAP 13.4(b)(1), (2).

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<sup>2</sup> Although at oral argument Hartford/Sentinel requested summary judgment in their favor, they failed to brief the issue, and Division I correctly declined to consider an issue Hartford/Sentinel did not brief. Op. at 9 n.9.

“An insured can show an unfair or deceptive practice that impacts the public interest by establishing a violation of the regulations related to unfair insurance company practices as set forth in chapter 284-30 WAC.” *Shields v. Enter. Leasing Co.*, 139 Wn. App. 664, 675, 161 P.3d 1068 (2007). A violation of any one of the claims-handling regulations is per se bad faith and a per se violation of the CPA. *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 922–23, 792 P.2d 520 (1990).

After failing to address or dispute that Hartford/Sentinel violated certain claims handling regulations, namely WAC 284-30-360(2), (3), and (4), Hartford/Sentinel waived any argument with respect to those provisions. Op. at 26. (“BluWater argues that Hartford has waived any argument as to the court’s determination that it violated WAC 284-30-360(3) and WAC 284-30-360(4). We agree.”).<sup>3</sup>

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<sup>3</sup> The trial court found Hartford violated WAC 284-30-360(2). CP 3122. Although Division I did not specifically find



Even if Hartford/Sentinel had not waived its argument, “Hartford does not present any argument or evidence to establish that a genuine issue of material fact exists as to the court’s finding that Hartford violated subsections (3) and (4) of WAC 284-30-360.” Op. at 27. And instead, Division I found that Hartford’s violations of the regulations were supported by evidence that it acted in bad faith. *Id.* at 26–27.

None of the cases cited by Hartford/Sentinel preclude summary judgment on the CPA violation issue, and there is no conflict between the cases cited and Division I’s opinion. RAP 13.4(b)(1), (2).

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Hartford/Sentinel waived its argument with respect to this subsection, Hartford/Sentinel failed to brief this issue on appeal, entirely, thus waiving its argument like it did with subsections (3) and (4).

**C. Division I properly affirmed the trial court’s ruling on bad faith as a matter of law relating to the policy’s liability coverage.**

Review should be denied on this issue because there is no conflict with any of the bad-faith cases Hartford/Sentinel’s references. Pet. at 15–16.

Hartford/Sentinel failed to present any evidence that it acted reasonably in handling BluWater’s insurance claim.<sup>4</sup> Yet, Hartford/Sentinel now, for the first time, claims it reasonably violated the claims-handling regulations because the policy imposes a duty to investigate a “suit” but gives Hartford/Sentinel discretion to investigate an “occurrence.” Pet. at 5–6, 17. Hartford/Sentinel alleges it had no duty to

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<sup>4</sup> “Hartford argues that the trial court should have denied summary judgment when Hartford raised material issues of fact. But Hartford does not discuss what those facts are or cite to the record. RAP 10.3(a)(6) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record).” Op. at 24.

investigate or reasonably communicate with BluWater until a suit was filed. *Id.*

The Court should reject this argument for two reasons: (1) Hartford/Sentinel did not properly raise the argument below, and (2) the source of an insurer's obligations is greater than the terms of the policy but include those mandated by law.

First, Hartford/Sentinel failed to raise its "occurrence"-versus-"suit" argument in the lower court and failed to brief the issue until its petition for review, and "[t]his court does not generally consider issues raised for the first time in a petition for review." *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998).

Second, Washington law imposed extracontractual obligations on Hartford/Sentinel, which it violated. Washington's claims-handling regulations appear at WAC 284-30-300 to -380. The regulations apply "to all insurers and to all insurance policies and insurance contracts." WAC 284-30-310.

The regulations define “certain minimum standards” for the handling of insurance claims. WAC 284-30-300.

Under WAC 284-30-360(4), which Hartford/Sentinel indisputably violated, Hartford/Sentinel’s duties to provide forms, instructions, and reasonable assistance are triggered by “notification of a claim.” “Notification of a claim” means “any notification ... by a claimant, which reasonably apprises the insurer of the facts pertinent to a claim.” WAC 284-30-320(14). With respect to liability coverage, BluWater gave this notification as early as November 2021 when it submitted its landlord’s letter threatening litigation. CP 646.

Additionally, insurers owe insureds a duty of good faith arising from their relationship, and the duty of good faith is not limited to the terms of the insurance contract. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385–86, 715 P.2d 1133 (1986). Regardless of the contractual duties promised, Hartford/Sentinel’s also owed a duty of good faith arising from

its fiduciary relationship to BluWater: “This fiduciary relationship ... implies ‘a broad obligation of fair dealing’ and a responsibility to give ‘equal consideration’ to the insured’s interests.” *St. Paul Fire & Marine Ins. Co.*, 165 Wn.2d at 129-30 (citations omitted); *see* RCW 48.01.030 (“The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.”).

That the policy gives Hartford/Sentinel “discretion” to investigate any “occurrence” before a lawsuit is filed does not change that the law imposed on Hartford/Sentinel a duty to investigate, reasonably communicate, and assist with BluWater’s claim once BluWater submitted the claim. Even after Hartford learned Leschi Partners filed a lawsuit against BluWater, Hartford/Sentinel continued to take no action for months. CP 2749.

It is undisputed that Hartford/Sentinel's violations of WAC 284-30-360 (2), (3) and (4), constitute a breach of the insurer's duty of good faith, and Division I's decision does not conflict with any cases cited. RAP 13.4(b) (1), (2).

**D. Division I correctly upheld the trial court's finding that Sentinel violated the discovery rules.**

Review is not appropriate to address issues Hartford/Sentinel waived below. Hartford/Sentinel asks this Court to find it did not engage in discovery violations, Pet. at 24, but it ignores the fact that it "waived any assignment of error related to its claim that BluWater's CR 30 (b)(6) notice was too broad" by failing to brief the issue. Op. at 36–37.

Even if it had not waived the issue, Hartford/Sentinel ignores the detailed, specific record citations contained in BluWater's brief before Division I proving Hartford/Sentinel failed to designate a witness on Topics 21–27, CP 4739–43, 4972, 5015; and designee Derek Cole was woefully unprepared on topics for which he was designated, CP 5012–13, 5014.

Contrary to Hartford/Sentinel's suggestion that BluWater was engaged in abusive discovery pursuits, this record is unusually robust because it includes an expert declaration from a retired insurance industry executive documenting for the trial court justification for the subjects of discovery. CP 5377–92.

Regarding the trial court's order that Hartford/Sentinel designate an upper-level executive as its make-up CR 30(b)(6) designee, Hartford/Sentinel ignores Division I's reliance on CR 37(a)(2), which authorizes the trial court to compel a designation. Op. at 38.

Hartford/Sentinel persists in incorrect characterizations of the conduct of BluWater's counsel. Pet. at 26–27. Rather than rebut these false allegations, it suffices to say that appellate review of discovery rulings is for abuse of discretion; Division I's decision has all the hallmarks of a thorough, thoughtful analysis; and Hartford/Sentinel fails to identify any decision of

this Court or the Court of Appeals with which Division I's decision has anything near a conflict.

**E. If the Court accepts review of Hartford/Sentinel's claims, the Court should also accept review of the Division I's interpretation of the "care, custody, or control" provision of the policy.**

BluWater is concerned with Division I's misapplication of contract interpretation principles and well-established law construing insurance-policy ambiguities in favor of insureds. Division I should not have construed an undefined policy term, "[p]roperty of others that is in your care, custody or control," with the benefit of the doubt favoring Hartford/Sentinel. Op. at 13–16.

Indeed, "[w]here possible, we harmonize clauses that seem to conflict in order to give effect to all of the contract's provisions." *Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 710, 375 P.3d 596 (2016). "[A]mbiguities in insurance policies are resolved in favor of the insured." *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 411, 229 P.3d 693 (2010).



“A term will be deemed ambiguous if it is susceptible to more than one reasonable interpretation.” *McLaughlin v. Travelers Commercial Ins. Co.*, 196 Wn.2d 631, 642, 476 P.3d 1032 (2020). Over 70 years ago, this Court acknowledged the principle that if insurance policies “are so drawn as to require interpretation and fairly susceptible of two different conclusions, the one will be adopted most favorable to the insured; and will be liberally construed in favor of the object to be accomplished, and conditions and provisions therein will be strictly construed against the insurer.” *Id.* at 642–43 (quoting *Jack v. Standard Marine Ins. Co.*, 33 Wn.2d 265, 271, 205 P.2d 351 (1949)).

The Policy covers “property of others that is in your care, custody, or control.” CP 710. The policy does not define “care, custody or control.” *Id.* The provision is fairly susceptible to two different conclusions.

One conclusion, offered by BluWater, is that this provision covered the electrical panel because it was located on the building, entirely within BluWater's leased space, and served BluWater's restaurant only. CP 602, 1247. A second conclusion is that the provision that does not reach the electrical panel because it is affixed to the building. Op. at 15.

Faced with a provision that was susceptible to more than one reasonable conclusion, Division I was required to resolve the ambiguity in favor of the insured.

This case is not suitable for review. But the case for review of the "care, custody, or control" issue is more compelling than the issues Hartford/Sentinel raise. Thus, if the Court grants review of Hartford/Sentinel's issues, it should also grant review of the "care, custody, or control" issue because Division I's decision conflicts with the cases requiring resolving ambiguities in favor of coverage.

## **VI. CONCLUSION**

This Court should deny Hartford/Sentinel's petition for review. If it grants review, it should also grant review on the "care, custody, or control" issue.

*Certification.* This document contains 4,948 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images.

RESPECTFULLY SUBMITTED, August 22, 2024.

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## DECLARATION OF SERVICE

The undersigned hereby declares I am over the age of 18 and under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in a manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

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Dated August 22, 2024, at Seattle, Washington.



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Shannon K. McKeon, Legal Assistant

# RUIZ & SMART LLP

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