No. 1036531

THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARIANNE MEEKER, an individual,
Appellant,

vs.

TRUMBULL INSURANCE COMPANY, a foreign insurer and a member of the Hartford Fire and Casualty Group of Companies,
Respondent,

JAMES H. ORR and LEONA ORR, individually and the marital community composed thereof; LIBERTY MUTUAL INSURANCE COMPANY AND/OR LIBERTY INSURANCE COMPANY, foreign insurers and members of the Liberty Mutual group of companies;
Defendants.

RESPONDENT TRUMBULL'S ANSWER TO APPELLANT'S PETITION FOR REVIEW TO THE WASHINGTON SUPREME COURT

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I. INTRODUCTION

This insurance coverage dispute involves basic issues long resolved by Washington courts: when does an insurer have a duty to defend?; what is "bodily injury"?; what is "property damage"?; what is an accident?[1] The Court of Appeals' unanimous unpublished decision addresses those issues consistently with years of Washington precedent. This case involves the application of those legal concepts in a discrete claim between the two interested parties, and has no broader public interest. Respondent Trumbull Insurance Company ("Trumbull") respectfully requests that the Supreme Court deny Appellant's Petition.

II. STATEMENT OF THE CASE

James Orr, Trumbull's insured, transferred possession of a horse named Sticks to Appellant Meeker. Meeker and the Orrs dispute whether this transfer was a gift or a lease. Several

[1]The Court of Appeals did not reach the issue whether there was an accident, concluding it unnecessary because there were no allegations of "bodily injury" or "property damage."

years later, Mr. Orr took and moved Sticks, an action Meeker characterized as a "theft." [CP 4 ¶3.8] Meeker then sued the Orrs, alleging six causes of action: Replevin; Declaratory Judgment; Breach of Implied Contract; Promissory Estoppel; Equitable Estoppel; and Unjust Enrichment. [CP 1-8] Despite detailed factual allegations in the Complaint regarding the transaction that resulted in Meeker accepting Sticks, Meeker never alleged that she suffered "bodily injury" as defined by the policy.[2] She did, however, specifically allege under the causes of action for Replevin and Breach of Implied Contract, "economic loss . . . emotional distress; mental pain and suffering.[3]

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[2]The policy defines "bodily injury" as meaning "bodily harm, sickness or disease, except a disease which is transmitted by an 'insured' through 'sexual contact.' 'Bodily injury' includes required care, loss of services and death resulting from covered bodily harm, sickness or disease." [CP 367]

[3]Meeker now alleges that she suffered elevated blood pressure and heart rate as physical manifestations of her emotional distress (although she does not allege that either of those manifestations caused injury). Petition at 3. However, the citation to the record is from a Declaration she filed on

In fact, Meeker's contention that her Complaint can be construed to allege "bodily injury" are contradicted by her sworn deposition testimony. When the Orrs' counsel asked whether Meeker's Complaint alleged physical injury, she testified that her Complaint did not allege physical injury.

> Q. Well, anything that furnishes the basis of this lawsuit. So, again, I didn't see anything *in the Complaint* here *that alleges* that you're suing the Orrs because of some *physical injury* you've sustained. And I want to be clear about that. You're not, are you?
>
> A. I have not yet.

[CP 471 (emphasis added)]

Meeker later amended her Complaint to add a cause of action for negligent misrepresentation. [CP 16, ¶¶10.1-10.6] The Amended Complaint did not allege that the negligent misrepresentation caused bodily injury or property damage.

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reconsideration of the trial court's summary judgement ruling, *after* the underlying case had been resolved, and *after* the trial court granted summary judgment in the coverage case. [CP 847-48] More to the point, however, she alleges these physical manifestations occurred *before* Mr. Orr took Sticks. *Id.*

After Trumbull disclaimed a defense, Meeker settled with the Orrs, and obtained a covenant judgment. Meeker sought to have the trial court determine that her settlement was reasonable. With an obvious eye toward the inevitable litigation against Orrs' insurers, Meeker filed a motion in which she *alleged* "at least $150,000 in general damages in emotional pain and suffering, as well as pain and suffering associated with her bodily injury."[4] [CP 21] However, the papers submitted in support of Meeker's reasonableness motion contained no evidence of physical injury.[5] [CP 29-91] The trial court entered its findings of facts and conclusions of law finding the settlement reasonable. [CP120-133] The court concluded only that "the types of damages alleged would be persuasive to a jury." [CP 121] The court did not find, and had no evidence upon which to support a finding, of "bodily injury" or "property

[4]Her motion alleged no damage to property.

[5]Meeker asserts in her Petition that she "presented evidence" in support of her claims for a reasonableness determination. Petition at 10. That contention is belied by the record. [CP29-91]

damage."

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A petition for review will be accepted *only* where the Court of Appeals' decision is in conflict with a Supreme Court or published Court of Appeals' decision, or is of substantial interest to the public that it should be determined by the Supreme Court. RAP 13.4(b)(1), (2), (4). None of those criteria are met here.

A. The Court of Appeals Decision is Consistent with Longstanding Washington Case law

Meeker first contends that the Court of Appeals' decision conflicts with established law because it did not address the effect of the reasonableness hearing. Meeker is wrong factually and legally.

Factually, she is wrong because the trial court did not find, because it had no evidence upon which it could find, that Meeker suffered "bodily [physical] injury" or "property damage." Nor could it. Meeker presented no evidence that she

suffered a physical injury or property damage. She submitted no deposition testimony to that effect. She submitted no medical records. She submitted no medical or expert testimony. A trial court's findings must be supported by substantial evidence. *Landmark Dev. Co. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.3d 1234 (1998). "Substantial evidence is when there is sufficient evidence to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The trial court's conclusions of law must, in turn, be supported by valid findings of facts. *Id.*

In Meeker's Motion to Determine Reasonableness, the facts are set forth in the first three pages. [CP 18-20] There is no mention of physical injury. No actual evidence was submitted in support of a claim for "bodily injury" or "property damage." [CP 29-119] Instead, for example, Meeker submitted deposition excerpts of a number of fact witnesses regarding the transfer of Sticks, but no testimony by Meeker

herself about her injuries. [CP 51-75] An expert disclosure was submitted discussing re-homing race horses, but no medical or expert testimony about Meeker's alleged injuries. [CP 81-84]. Meeker submitted a statement of her economic damage in caring for Sticks, but no reference to a "bodily injury." [CP 40-44]

Meeker's claim also fails legally. The cases cited by Meeker, *Mutual of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008) and *Bird v. Best Plumbing Grp.*, 75 Wn.2d 756, 387 P.3d 551 (2013) apply only to those issues resolved in the reasonableness hearing.

Here, whether Meeker's complaint alleged "bodily injury" or "property damage" were not issues presented to the trial court in reviewing the reasonableness of her settlement with the Orrs.

B. The Court of Appeals Decision is Consistent with Washington's Notice Pleading and Duty to Defend Law

The duty to defend applies when a complaint, construed

liberally, alleges facts that, if proven, impose liability on the insured within the policy's coverage. *Nat'l Sur. Corp. v. Immunex Corp*., 176 Wn.2d 872, 879, 297 P.3d 688 (2013). Initially, the duty to defend is to be determined from the eight corners of the complaint and the policy. *Expedia, Inc. v. Steadfast Ins. Co*., 180 Wn.2d 793, 803, 329 P.3d 59 (2014).[6] If the allegations in the complaint clearly fall outside of the policy's coverage, the complaint does not trigger an insurer's duty to defend. *Immunex, supra*, at 879.

Washington courts have long held that where, as here, "bodily injury" is defined to mean "physical injury", "bodily injury" does not include mental or emotional distress. *E-Z Loader Boat Trailers, Inc. v. Travelers Indemnity Co*., 106 Wn.2d 901, 726 P.2d 439 (1986); *Daley v. Allstate Ins. Co*., 15 Wn.2d 777, 958 P.2d 990 (1998); *Northwest Farm Bureau Ins.*

[6]Two exceptions exist, requiring insurers to look outside the four corners when (1) the complaint is not clear, or (2) the insurer has knowledge that conflicts with the facts of the complaint. *Expedia*, at 803-804. Neither exception applies here.

Co. v. Roberts, 52 Wn. App. 888, 891, 765 P.2d 328 (1988); *Grange Ins. Co. v. Roberts*, 179 Wn. App. 739, 757, 320 P.3d 77 (2013). The Court of Appeals decision is consistent with these longstanding decisions.

Meeker's Complaint alleged no facts supporting the existence of a physical injury. Meeker contends that she suffered a myriad of physical injuries while riding Sticks. However, she did not sue for those injuries. This is confirmed by her deposition testimony, in which she testified that she did not believe her complaint sought damages for "bodily injury." [CP 471] In other words, she did not seek damages because of "bodily injury" as required by the policy. *Atlantic Mutual Ins. Co. v. Roffe*, 73 Wn. App. 858, 862, 872 P.2d 536 (1994) ("Under the policy, the mere fact that injury occurred does not create a duty to defend. The plaintiff's injury must be "because of" the bodily injury.") For example, Meeker does not allege that she was physically injured because the Orrs failed to warn her of about some dangerous propensity of the horse, or that the

horse was unreasonably dangerous.

Meeker further misunderstands the interaction between the notice pleading rules and the duty to defend standard. Under *Expedia*, the duty to defend applies when the facts as actually alleged are conceivably covered. *Expedia*, at 802. However, Meeker turns this on its head, asserting instead that the duty to defend applies if facts that conceivably could have been pled would be covered. Meeker cites to no authority that would require Trumbull to defend based upon facts her complaint conceivably *could* have alleged but conclusively did not.

Meeker further suggests that the Court of Appeals' opinion was inconsistent with Supreme Court opinions, when determining that emotional distress is not recoverable under a claim for negligent misrepresentation arising out of a business transaction. The Court of Appeals fully explained its conclusion as consistent with Washington law. Opinion at 14, n.6.

More importantly, however, the argument is moot. First, Meeker's negligent misrepresentation claim does not allege that she suffered emotional distress as a result of the negligent misrepresentation. Moreover, the negligent misrepresentation claim deals with the Orrs' alleged misrepresentations to convince Meeker to take the horse in the first instance. There is no allegation in the Amended Complaint that Meeker suffered emotional distress as a result of the Orrs' alleged negligent misrepresentations. Rather, her emotional distress claim allegedly arises out of the Orrs subsequently taking the horse.

Meeker claims that the Court of Appeals decision is contrary to *Trinh v. Allstate Ins. Co.*, 109 Wn. App. 927, 37 P.3d 1259 (2002). *Trinh*, an uninsured motorist case, not a duty to defend case, held that bodily injury could include emotional distress accompanied by physical manifestations. However, this is irrelevant. Neither cause of action in Meeker's initial Complaint that she alleged caused emotional distress could have given rise to a claim for emotional distress. The nature of

replevin is not to recover damages in tort. *Selland v. Douglas County*, 4 Wn. App. 387, 389, 481 P.2d 573 (1971). Emotional distress is not recoverable from breach of contract, except in exceptional circumstances not present here. *Repin v. State*, 198 Wn. App. 243, 256-57, 392 P.3d 1174 (2017).[7]

Meeker did not testify in her deposition in the underlying tort action that she suffered physical manifestations. In fact, she testified her complaint sought no such injuries. In response to Trumbull's and Liberty's motion for summary judgment, she raised no such allegation. Indeed, she presented no such argument to the Court of Appeals. The only thing Meeker now points to is a self-serving declaration, filed after, and in reconsideration of, the summary judgment orders granted to Trumbull by the trial court. Even in that declaration, however,

[7]Indeed, it is questionable whether Meeker could have recovered emotional distress damages at all in this case, given that Washington courts have rejected emotional distress damages related to an animal, except in the instance of intentional or malicious infliction of injury to the animal, not alleged here. *Hendrickson v. Tender Care Animal Hosp. Corp.*, 176 Wn. App. 757, 768, 312 P.3d 52, (2013).

she made no allegation that the injury was because of the negligent misrepresentation claim. [CP847-848]

Finally, Meeker contends that the Court of Appeals' decision on "loss of use" conflicts with this Court's decision in *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, Co., 200 Wn.2d 316, 516 P.3d 796 (2022). However, *Seattle Tunnel* has no bearing here. *Seattle Tunnel* was a first party property case. At issue, was weather the term "direct physical loss [or] … damage" includes deprivation or dispossession of property. There, it was undisputed that the insured had suffered loss of use. *Id.* at 322. The only issue was whether loss of use fell within the insuring agreement's coverage for direct physical loss or damage.

In this case, in contrast, the liability policy in question already defines "property damage" to include "loss of use." Thus, the question here is not whether "property damage" includes "loss of use" but whether Meeker alleged she had lost the use of Sticks.

The Court of Appeals' decision analyzed the phrase "loss of use" consistently with longstanding rules of contract interpretation and concluded that Meeker had not alleged "loss of use." Thus, there is no conflict with existing Washington cases that would merit review of this Court.

C. There is No Substantial Public Interest at Play

This case involves a discrete third party liability insurance coverage claim between two parties, involving insurance terms and concepts with long- and well-established interpretations in Washington. The Court of Appeals' decision is entirely consistent with that jurisprudence.

Meeker's concerns that the Court of Appeals did not appropriately address notice pleading and allegations of emotional distress are again a function of asking the wrong question. The issue is whether the policy conceivably covers the facts alleged. The question is not, as Meeker poses it, whether the policy coverage facts that conceivably could have been alleged, but were not.

Furthermore, as the Court of Appeals properly observed, Meeker did not plead tort claims that imply recovery for "bodily injury." Instead, they "sound in equity, loss of possession and contract." Opinion at 14. Thus, the defect in Meeker's pleading is not only that she specifically pled mental and emotional, rather than bodily, injury. It also did not allege tort claims amenable to recovery for bodily injury. As a result, there is no public interest issue to be resolved.

IV. CONCLUSION

There are no grounds under RAP 13.4(b) which support the Court accepting Meeker's petition for review. The Court of Appeals' decision is consistent with prior Washington cases interpreting the terms "bodily injury" and "property damage."

Nor is the Court of Appeals opinion inconsistent with Washington's handling of the preclusive effect of reasonableness determinations. Meeker simply provided no evidence to the trial court that addressed the issues presented here.

Finally, the Court of Appeals decision was consistent with prior case law regarding the duty to defend and notice pleading. The law requires only that an insurer examine whether what is actually pled could conceivably be covered. It does not require an insurer to guess what could have been conceivably pled but was not.

I certify that ***Respondent Trumbull's Answer to Appellant's Petition for Review to The Washington Supreme Court*** contains 2,248 words (excluding words contained in appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images) in compliance with RAP 18.17.

DATED this 23rd day of December, 2024.

FORSBERG & UMLAUF, P.S.

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CERTIFICATE OF FILING AND E-SERVICE

I hereby certify that on December 23, 2024, I electronically filed the foregoing Answer to Appellant's Petition for Review to the Washington Supreme Court with the Clerk of the Court using the electronic filing system on the following:

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December 23, 2024 - 1:47 PM

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