Supreme Court No. 1043902

Court of Appeal Cause No. 86200-6-I

THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRAD AND AMY WHALEY,

Appellants,

vs.

OHIO SECURITY INSURANCE COMPANY,

Respondent.

RESPONDENT'S ANSWER TO APPELLANTS' PETITION FOR REVIEW

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I. INTRODUCTION

This case involves an unpublished Court of Appeals decision regarding a discrete issue of property coverage for a single policy holder under a specific set of undisputed facts that present no difficulties with respect to the applicability of the Protective Safeguards endorsement in the Ohio Security policy. Under the guise of substantial public interest, Whaleys ask this court to ignore those facts, and instead issue an advisory opinion regarding the policy's general application under any potential fact pattern.

The Whaleys have not identified any Supreme Court decision in conflict, or any constitutional issue, that would merit review. Instead, the Whaleys ask the Court to change the law and apply a prejudice standard to provisions of the policy not relating to the presentation and handling of the claim. Ohio Security respectfully requests that Whaleys' petition be denied.

II. STATEMENT OF THE CASE

Whaleys owned a building in Bellingham, where they operated a restaurant for many years. In the fall of 2019, they transferred the restaurant business to co-defendant Martinez and leased them the building to operate the restaurant. CP 101-122. The building was covered by a commercial property insurance policy issued by Ohio Security. CP 208-438. As a result of the transfer of the restaurant business, on September 1, 2019, Whaleys amended their policy with Ohio Security to cover only the structure and their liability risks as landlords.[1] CP 211.

The policy was endorsed with a "Protective Safeguards" endorsement. CP 379-380. The Protective Safeguards

[1]Citing CP 211, Appellants contend that the policy was "changed" to add the Protective Safeguards endorsement. Petition, at 3. This assertion is unsupported by the record. The change endorsement describes the change to the policy as "Amend to lessors risk only. Occupied as restaurant. Delete Business Personal Property, Employment Practices liability and Liquor Liability." Nothing in the change endorsement suggests the policy was changed to add the Protective Safeguards endorsement.

endorsement amended the insurance policy in two ways. First, the endorsement added a condition:

> A. The following is added to the Commercial Property Conditions:
>
> Protective Safeguards
>
> 1. As a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule Above.
>
> 2. The protective safeguards to which this endorsement applies are identified by the following symbols:
>
> . . .
>
> "P-9", the protective system described in the Schedule.

Id. The referenced protective system is described in the schedule as follows:

> An automatic commercial kitchen fire suppression including hood, plenums, exhaust ducts, and fire extinguishing equipment over cooking appliances that is in compliance with both

> Underwriters Laboratories standard (UL300) and National Fire Protective Association 96 (NFPA 96). The suppression system must be inspected and serviced semi-annually by an independent contractor and the ventilating system must be cleaned quarterly by an independent contractor.

CP 379.[2]

In addition to this condition, the Protective Safeguards endorsement added an exclusion to the policy:

> A. The following is added to the Exclusions section . . .
>
> . . .
>
> We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you:
>
> 1. Knew of any suspension or impairment in any

[2]The UL 300 is a standard for Fire Testing of Fire Extinguishing Systems for Protection of Restaurant Cooking Areas, promulgated by Underwriters Laboratory. NFPA 96 is a national standard for ventilation control and fire protection commercial cooking operations promulgated by the National Fire Protective Association.

protective safeguard listed in the Schedule above and failed to notify us of that fact; or

2. Failed to maintain any protective safeguard listed in the schedule above, and over which you had control, in complete working order.

CP 380.

A. Maintenance and Inspection of Protective Safeguard System

1. The Café Burlington Protective System

Two components comprised the fire protective system at Café Burlington. The first was the Commercial Kitchen Ventilation (CKV) system which comprises a hood extending over the cooking appliances, a plenum (an area inside the hood which houses the fusible links that trigger activation of the suppression system), and the duct, which provides the pathway to remove cooking exhaust (and in the event of fire, smoke) from the building. CP 600. An exhaust fan sits at the top of the duct, creating negative pressure to remove the exhaust. *Id.*

After hours, the exhaust fan should automatically activate when the system activates.[3]

During a fire, a properly installed and functioning CKV system will keep the fire and smoke within the hood and keep it from spreading to the building. CP 601-602.

The second component was the fire suppression system itself. The system, manufactured by Kidde, involved a wet chemical agent contained within a pressurized cylinder. CP 599. If no one is present, the system automatically activates by a tension loaded system. *Id.* Devices called fusible links are placed along a tensioned cable above the appliances. *Id.* When a specified temperature is exceeded, the link separates, releasing tension on the cable and activating the system. *Id.* The system is connected to a control system, which, among

[3]Because the exhaust fan creates negative pressure, the system introduces make up air while in operation. CP 596. When the system is activated, the makeup air should turn off, so that air is not introduced to fuel the fire. *Id.*

other things, activates the exhaust fan and shuts off the makeup air. *Id.*

The link should have a rating that is high enough not to activate during normal cooking, but not so high as to delay activation of the system in the event of a fire. CP 595-596, 603-604. A temperature survey is mandatory to establish the proper temperature rating for the links. CP 596. Typically, for the type of appliances used by Café Burlington, a 360-degree link would be appropriate. CP 603. While a 500-degree link might be appropriate for certain appliances, Café Burlington did not have those appliances. *Id.*

2. Maintenance of the System did not comply with the policy conditions

Whaleys hired Alpine Fire and Safety Systems, Inc. (Alpine) to service the CKV and suppression equipment. CP 1209, 20:8-16. A second company, Cascade Hood Service (Cascade), cleaned the equipment. CP 1218, 55:2-6. Between 2017 and 2019, Alpine serviced the fire suppression system annually, rather than semi-annually as required by the

Protective Safeguards condition. CP 1213, 34:17-24; CP 1270-1285. Cascade cleaned the hood at most semi-annually, rather than quarterly, as required by the Protective Safeguards condition. CP 1287-1293.

3. Prior inspections found the system non-compliant with UL 300 and NFPA 96

On October 1, 2018, a year before the fire, Alpine inspected the fire suppression system. CP 1274-1276; CP 24, 34-36. Alpine noted numerous deficiencies in the fire suppression system. *Id.* The report found that the system did not meet UL300 requirements. CP 24, 36. Mr. Whaley received this inspection report. CP 1214, 39:18-21. Mr. Whaley conceded that the deficiencies that took the system out of compliance with UL 300 were not remedied. CP 1216, 46:13-20. Mr. Whaley did not report these deficiencies to Ohio Security. CP 1215, 42:17-21.

On September 18, 2019, several months before the fire, Alpine inspected the fire protective system. CP 1278-1285; CP 21-32. The report from that inspection identified generally the

same deficiencies noted during the 2018 inspection. *Id.* Among other deficiencies noted, the duct to plenum transition was not properly welded, but sealed with silicone. CP 22. The system's exhaust fan did not come on when the system activated, and the makeup air did not shut down. CP 23. The system was missing a link over an appliance, and there was improper nozzle coverage. *Id.* Alpine's inspection again found that the system was not UL 300 compliant. CP 22, 28. Neither did the system comply with NFPA 96. CP 22, ¶5.

Mr. Whaley left it up to Alpine to remedy certain of the deficiencies but did nothing to follow up to see if they had been remedied. CP 1215, 44:6-45:2; CP 1216, 46:25-47:17, 47:18-48:3, 48:9-25. Other deficiencies he left to an electrician. CP 1215, 44:11-45:2; CP 1217, 50:3-14; 51:23-52:7. Electrician records confirm no work was performed after the September 2019 Alpine inspection. CP 1605-1611. Still others, Mr. Whaley just didn't resolve. CP 1216-1217, 49:5-50:2; 50:15-22.

On September 30, 2019, the City of Burlington conducted a fire inspection. CP 490, ¶3. The resulting report identified a number of deficiencies, including: (1) the hood joints were not properly welded, but were sealed with silicone; (2) the hood had pulled away from the wall and was resting on the appliances; (3) the fusible links were from a different manufacturer than the suppression system; (4) there was an incorrect nozzle over the griddle; (5) a fusible link or heat detector was not provided above each cooking appliance; and (6) no temperature survey had been conducted. CP 487, ¶4; CP 493-494. The inspection also noted that the hood exhaust did not activate, and the makeup air did not shut off when the suppression system activated. CP 488, ¶¶4.1 and 4.j; 493-494. These were consistent with the deficiencies identified by Alpine and prevented the system from being UL 300 or NFPA 96 compliant. CP 488, ¶5. Mr. Whaley and the tenant were present during the inspection. CP 1218, 55:19-21; CP 487, ¶3. Mr. Whaley was provided with the Fire Marshal's findings. CP

1220, 62:9-11; CP 488, ¶8. The fire department required that the deficiencies be corrected within 30 days. CP 493. However, Fire Marshal Blaine's post-fire investigation determined that the deficiencies were never corrected. CP 489, ¶11.

B. The Fire

On December 16, 2019, a fire occurred in the restaurant. CP 488, ¶9. Fire Marshal Blaine and others[4] determined that the cause and origin of the fire was a pot of cooking oil left on a griddle. CP 489, ¶10, CP 609. The fire resulted in fire and smoke damage outside of the hood area of the kitchen, and smoke damage throughout the restaurant. CP 489, ¶¶12-13.

The investigation identified the same deficiencies that existed prior to the fire. CP 489, ¶11. For example, deficiencies in the hood seams and attachment to the wall allowed fire to escape the hood system and damage the

[4]Also present was the Mount Vernon Fire Marshal, a Special Agent with the ATF, and two technicians from All American Fire, specialists in fire protection systems. CP 617.

restaurant. CP 489, ¶11-12. Photos from the Fire Marshal's investigation show that this deficiency, which existed prior to the fire, allowed fire and smoke to escape the hood and cause damage. CP 957-958. This fact was not disputed.

Similarly, the failure of the hood exhaust to turn on and make-up air to shut off allowed smoke and flames to escape the hood and cause greater damage. CP 489, ¶12.

As part of his investigation, Fire Marshal Blaine retained All-American Fire Protection, fire protection system technicians. All-American's report identified similar significant system inadequacies and impairments. CP 173-190. The report opined that while the system ultimately put out the fire, the incorrect links were a factor in the length of time the fire was allowed to burn, and the amount of smoke produced. CP. 183.

C. <u>The Claim</u>

The claim was reported to Ohio Security the day after the fire. Ohio Security began its investigation. Ohio Security

inspected the loss on December 23, 2019, with Mr. Whaley present. CP 1329.

Ohio Security retained cause and origin investigator Ted Hickey from RIMKUS. CP 1332. On January 14, 2020, Ohio Security's adjuster spoke with the Fire Marshal, who confirmed that the suppression system did not meet manufacturer requirements. CP 1327-1328. Ohio Security's adjuster also spoke with Mr. Whaley, who confirmed that he had not performed the system repairs required by the City of Burlington's inspection. CP 1327. OSIC denied the claim on February 20, 2020, because the loss was excluded by the fire Protective Safeguards endorsement exclusions and condition. CP 1613-1619.

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The Whaleys contend review should be accepted primarily under RAP 13.4(b)(4). The Whaleys also contend

RAP 13.4(b)(1) and (3) apply.[5] Under RAP 13.4(b)(1) and (4) A petition for review will be accepted *only* where the Court of Appeals' decision is in conflict with a Supreme Court or is of substantial interest to the public that it should be determined by the Supreme Court. RAP 13.4(b)(1), (2), (4). Neither standard is met here.

A. <u>There is no Issue of Substantial Public Interest Involved</u>

This case involves a discrete issue of property coverage involving a single policy holder under a very specific set of undisputed facts that clearly apply to the policy language in the Ohio Security policy. Whaleys have not contended any language in the Ohio Security policy is ambiguous. To the contrary, the Whaleys repeatedly concede that the policy language is "plain." *See, e.g.*, Petition, at 17.

Instead, the Whaleys take issue with what they perceive

[5]RAP 13.4(b)(3) applies only when there is a significant constitutional question. Whaleys have identified no such constitutional question, and so Ohio Security will not address this basis further.

to be the breadth of the Court of Appeals' statement at page 14 of the opinion that "any noncompliance with 'UL 3000 or NFPA 96 standards'" constitutes an "impairment." Petition at 15. Whaley misreads the Court of Appeals. In actuality, the Court of Appeals held only that impairment was not synonymous with "loss of function." *Whaley* at 14. That is not the same as saying any deficiency could trigger the exclusion.

Nevertheless, *in this case*, it is undisputed that the deficiencies in the system were material to the loss, and were not mere technical failures. The clearest example is the condition of the hood. It is undisputed that one purpose of the hood is to keep the smoke and fire within the hood, and prevent fire and smoke from exiting the hood and damaging the structure. It is undisputed that the hood had, before the fire, pulled away from the wall, and the hood to duct transition had been sealed with silicone, rather than a solid weld. The post-fire investigation clearly found that fire escaped the hood and damaged the structure because of this deficiency.

Another example involves the electrical failure of the hood exhaust to turn on and the make-up air to turn off in the event of a fire. It is undisputed that this deficiency was noted pre-loss by both Alpine and the Fire Marshal's inspection, and it is undisputed it was never repaired. The failure of the exhaust to turn on (to remove smoke) impacted the amount of smoke damage to the structure.

A third deficiency involved the failure to conduct a temperature survey to establish the proper fusible link temperature, and the use of links that were too high, this delaying triggering of the system. CP. 183, 200, 627.[6]

[6]Whaley makes much of their examination of Fire Marshal Blain and Mr. Hickey regarding the improper heat ratings of the fusible links, and the delay in activating the system. All-American Fire Protection, upon whom Fire Marshal Blaine relied, reached the same conclusion. All experts, however, were consistent in their opinion that the links delayed activation. Even if this one deficiency cannot be directly tied to additional damages, however, the fire damage resulting from other deficiencies were not disputed.

In essence, Whaley seeks an advisory opinion[7] from this Court that the policy may not apply to "technical" or "immaterial" deficiencies not present here, even though the policy language clearly applies to the material deficiencies that existed *in this case*. The Whaleys have not provided a single example of a hypothetical condition which they deem to be technical or immaterial, nor do the Whaleys argue that the deficiencies that do exist in this case are immaterial or technical. The Court should decide whether to accept review based on the facts *of this case*, rather than on the facts the Whaleys wish they had.

Ultimately, the issue is not whether any potential deficiency, in the abstract, is material, or constitutes an impairment to the system. Instead, the issue is whether, under the facts of the case at hand, the defects that did exist were

[7]Courts will not engage in advisory opinions. *Howard v. Pinkerton*, 26 Wn.App. 2nd 670, 678, n.5 (2023); *West v. Vermillion*, 196 Wn. App. 627, 640 (2016), *citing Walker v. Munro*, 124 Wn.2d 402, 418, 879 P.2d 920 (1994).

material to the fire or the resulting damage. In this case, it is undisputed that they were material. Thus, even if the Court were to accept review, and hold that the exclusion does not apply to every (unidentified and undefined) technical deficiency, it would still need to affirm this case because deficiencies in this case were material. There is no issue of substantial public interest.

B. Whaley's "Substantial Compliance" argument is inapposite

The Whaleys contend that the Court of Appeals erred when refusing to apply a substantial compliance test to the Protective Safeguards endorsement. Petition at 19. The Whaleys' argument is simply wrong. The Protective Safeguards endorsement includes both a condition precedent to coverage, and an exclusion. The Court of Appeals properly noted that the Whaleys provided no authority (and still provide no authority) that substantial compliance applies to an exclusion, and properly distinguished *Hernandez*, which treated the policy exclusion as a condition. *Whaley v. Ohio Sec. Ins.*

Co., No. 86200-6-1, 2025 Wash App. LEXIS 1145 (Ct. of App., June 16, 2025), at 23-24.

Even if substantial compliance were to apply, the facts are undisputed that Whaleys did not substantially comply. The deficiencies were known to the Whaleys for more than a year, and they did nothing to remedy them. Indeed, the Whaleys testified that they looked into making the required remedies but never did. While the system did ultimately extinguish the fire, it is similarly undisputed that the deficiencies led to additional damage. There was no issue for the jury.

C. There is no conflict with Washington Authority regarding the Prejudice Requirement

As they did at the Court of Appeals, Whaleys rely entirely on cases applying prejudice to post-claims handling conditions. Washington courts have not applied the prejudice requirement to conditions unrelated to claims handling functions. *See, Pilgrim v. State Farm Fire & Cas. Ins. Co*., 950 P.2d 479, 485 n.50 (Wash. Ct. App. 1997) ("[C]ourts refuse to analyze prejudice in cases involving types of clauses other than

those involving the handling of claims."); *Safeco Title Ins. Co. v. Gannon*, 54 Wn. App. 330, 774 P.2d 30 (1989) (refusing to apply prejudice analysis to a termination of coverage clause in a "claims-made" policy), *citing*, *Simms v. Allstate Ins. Co*., 27 Wn. App. 872, 876-77, 621 P.2d 155 (1980) (finding of prejudice not required to apply contractual suit limitations condition.). Whaleys cite to no published Washington authority extending the prejudice requirement to conditions precedent to coverage outside the post claim handling conditions.[8]

Moreover, any prejudice requirement, if extended, would only apply to the condition portion of the endorsement, not to the exclusion. Whaleys cite no authority that would extend prejudice to application of an exclusion.

Finally, even if a prejudice requirement were to apply, it is undisputed Whaleys prejudiced Ohio Security in this case. The failure to ensure that the fire protective system was

[8]For this reason alone, the case does not meet the requirements of RAP 13.4(b)(1).

compliant with the requirements in the Protective Safeguards endorsement resulted in additional damage to the structure. That is indisputably prejudice.

D. Whaleys' Concerns regarding the Court of Appeals Construction of the Record does not Warrant Review

Finally, Whaleys raise two issues regarding the Court of Appeals' construction of the record. Neither were raised on reconsideration, and neither fall within the RAP 13.4(b) standards for acceptance of Review. Regardless, neither suggested error is material to the Court of Appeals' decision to warrant review.

First, Whaleys point out, correctly, that the Ohio Security policy does contain a misrepresentation provision. However, the Court of Appeals' error in not recognizing that the Ohio Security policy and the policy in *United Specialty Ins. Co. v. Shot Shakers, Inc., 2019 U.S. Dist. LEXIS 7463 (W.D. Wash. Jan. 15, 2019)* contained the same misrepresentation clause is immaterial. It was Whaleys who attempted to distinguish *Shot Shakers* by claiming that the policyholder there made

misrepresentations. *Whaley*, at 22. However, the misrepresentations were immaterial to the *Shot Shakers* Court's holding on the Protective Safeguards endorsement.

In *Shot Shakers*, the insurer moved on three grounds: (1) Application of the Protective Safeguards endorsement; (2) application of the exclusion for material misrepresentations, and (3) for rescission of the policy. The Court granted the insurer's motion on the first two grounds. However, the court's analysis of the application of the Protective Safeguards endorsement was independent of its analysis of the exclusion for alleged misrepresentations. *Shot Shakers*, at 24-37.

Thus, Whaleys' attempt to distinguish *Shot Shakers* based on the claims of misrepresentation, and the Court of Appeals' erroneous rejection of that attempt, are immaterial to application of the Protective Safeguards endorsement.

Whaleys' second argument relates to the investigation by Ohio Security's cause and origin investigator, Ted Hickey, and whether Mr. Hickey followed the NFPA in his investigation.

Whaleys' argument fails for a number of reasons. First, Mr. Hickey is only one of four experts to opine, in addition to Fire Marshal Blaine, All American Fire Protection (upon whom Blaine relied and who was never deposed, and whose conclusions were never challenged) and Chip Barnhardt, who was retained as an expert by Ohio Security in the litigation.[9]

Second, Mr. Hickey was retained to determine the cause and origin of the fire. CP 1066 (p. 13:24-25). The cause and origin are not in dispute. The fire was caused by grease left on the flat top griddle and the location of the origin of the fire was the flat top griddle.

More importantly, however, Mr. Hickey did not opine and, and was not questioned about, the condition of the hood and vent, the fact that prior to the loss it had pulled away from the wall, and that the improper silicone seal had melted.

[9]Mr. Barnhart's expert report was submitted in opposition to Alpine's Motion for Summary Judgment. CP 581. Both Alpine's motion and Ohio Security's motion were heard at the same time, the trial court had all materials available, and Whaleys designated both motions' materials as Clerk's Papers.

Whaleys have never disputed that this deficiency existed, or that it resulted in damage to the structure.

IV. CONCLUSION

For the foregoing reasons, Ohio Security respectfully request that this Court deny Whaleys' petition for review.

I certify that ***Respondent's Answer to Appellants' Petition for Review*** contains 3,349 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 15th day of August, 2025.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing ***RESPONDENT'S OPPOSITION TO APPELLANTS' PETITION FOR REVIEW*** on the following individuals in the manner indicated:

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SIGNED this 15th day of August, 2025, at Seattle, Washington.

s/ Carol M. Simpson
Carol M. Simpson

FORSBERG & UMLAUF, P.S.

August 15, 2025 - 3:01 PM

Transmittal Information

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