68029-3 68029-3

No. 68029-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOEL JOHNSON.

Appellant,

v.

MOUNT VERNON FIRE INSURANCE COMPANY, an insurance company, and SAFECO INSURANCE COMPANY OF AMERICA, an insurance company,

Respondents.

OPENING BRIEF OF APPELLANT

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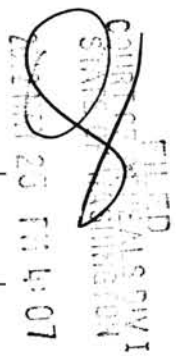

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INTRODUCTION

After Appellant Joel Johnson's home was destroyed by a fire, two separate insurance companies had a duty to repair his house. Both insurers wrongfully refused payments for two full years. Notwithstanding this wrongful conduct, the trial court erroneously ruled that Johnson had no remedy against either of his insurers.

On the night of the fire, Safeco denied coverage to Johnson because his mortgage company, Taylor Bean & Whitaker (Taylor Bean) had wrongfully stopped payment on a premium check it had sent to Safeco that was intended to pay Johnson's insurance premium with funds from his escrow account. But Safeco's denial of coverage was also wrongful because it did not actually cancel Johnson's insurance contract prior to the fire. Safeco never sent an explicit cancellation notice to Johnson. Moreover, while Safeco sent Taylor Bean a cancellation notice, the specified cancellation date was not until *after* the fire. Under Washington law, the cancellation of an insurance policy is not effective unless both the insured and the mortgage company are notified of the cancellation date so that they can correct the problem. Disregarding this well-established rule of Washington law, the trial court dismissed Johnson's claims against Safeco on a motion for summary judgment, ruling that Taylor Bean should bear responsibility instead of Safeco.

Because Safeco asserted its policy was not effective, Taylor Bean charged Johnson for its "force-placed" insurance policy contract with Mount Vernon Fire Insurance Co. ("Mount Vernon"). The force-placed policy provided coverage to homeowners, like Johnson, whose mortgages were held by Taylor Bean.

It is undisputed that Mount Vernon was obligated to provide coverage to Johnson for his fire damage. But for nine months, Mount Vernon refused to pay Johnson any money at all to repair his house. Mount Vernon also refused to pay Johnson money for his additional living expenses (ALE) and misrepresented to him the criteria for recovering those expenses. Mount Vernon had approved of him moving into his own rental property after the fire, but it later denied coverage for the cost of living in his rental property.

Johnson was 58 years of age and his financial situation became increasingly desperate due to Mount Vernon's refusal to pay what it owed. In order to survive, he exhausted his retirement account and received government assistance for food.

Then, about 10 months after the fire, in an act of desperation caused by Mount Vernon's refusal to pay what it owed, Johnson fabricated a written lease to prove he had renters. It is undisputed that those renters existed and had an oral lease with Johnson. Further, Johnson fabricated the

written lease only because of Mount Vernon's false statements that he could not be paid for his ALE because he could not provide a written record of his renters. Finally, although Mount Vernon received the written lease, it did not rely on it and Mount Vernon was not prejudiced in any way by Johnson's misrepresentation.

On a CR 50 motion, the trial court dismissed Johnson's extra-contractual claims of bad faith and violation of the Consumer Protection Act (CPA) against Mount Vernon. This ruling was based on the trial court's erroneous interpretation of *Mut. of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988), which barred legal action by an insured who had submitted a fraudulent insurance claim. But no appellate court has ever interpreted *Cox* to bar a legal action for insurer bad faith that *preceded* an insured's misrepresentation. To the contrary, statements by this Court and the Washington Supreme Court have clarified that *Cox* does not bar a legal action when the bad faith or violation of the CPA precedes the insured's misrepresentation.

Because there is no dispute in this case that Johnson's desperate misrepresentation of his lease occurred long after Mount Vernon violated the Consumer Protection Act and engaged in bad faith conduct, the trial court's directed verdict against Johnson should be reversed and this case should be remanded for trial. Because Safeco did not properly cancel the

policy prior to the fire under Washington law, the trial court's summary judgment dismissal of Johnson's claims against Safeco was also error. That dismissal should be reversed and Johnson's claims against Safeco should also be reinstated and allowed to proceed.

ASSIGNMENTS OF ERROR

1. The Superior Court erred in dismissing all claims against Safeco by ruling that Safeco was not obligated to provide a notice of cancellation and that the insurance policy contract was not in effect at the time of the fire.

2. The Superior Court erred in dismissing Johnson's CPA and bad faith claims against Mount Vernon by ruling that Johnson's misrepresentation retroactively absolved Mount Vernon of CPA violations and bad faith conduct preceding Johnson's misrepresentation.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

This appeal raises the following questions of law:

1. Where an insurer issues a renewal insurance policy contract and delivers it to the customer, and where the insurer receives a check for the premium in response to the renewal contract, but where that check was later inexplicably stopped by the customer's mortgage company, is the insurer required to provide notice before cancelling the policy?

2. When an insurer breaches its duty of good faith, violates the CPA and injures the plaintiff insured, but 10 months later the plaintiff insured makes a material misrepresentation, is the plaintiff insured retroactively barred from any remedy for the violations that preceded the misrepresentation?

STATEMENT OF THE CASE

A. Safeco Returns Johnson's Premium Payment, But Fails to Cancel Johnson's Policy Prior to His Fire

Johnson owned his house for 25 years prior to the fire. CP 118 at ¶ 3. He had a homeowner's insurance contract with Safeco for every one of those years. CP 118 at ¶ 3. In 2008, Johnson refinanced his mortgage with Taylor Bean. CP 118 at ¶ 4. Taylor Bean required Johnson to pay his insurance premium into an escrow account so that Taylor Bean could ensure he was at all times current with his premium payments to Safeco. CP 118 at ¶ 4.

On September 28, 2008 Safeco issued and mailed to Johnson a renewal policy. CP 41 at ¶ 2; CP 46-52. Taylor Bean was also sent a copy of the renewal policy. CP 41 at ¶ 2. In response, Taylor Bean sent Safeco payment of $630 for the policy premium on behalf of Johnson. CP 113. This was part of a bulk payment check from Taylor Bean to Safeco for all of the policy premiums that Taylor Bean was responsible for paying. CP 116. For an unknown reason, that batch payment check was stopped before the funds were transferred to Safeco. *Id.*

Safeco received the batch payment check, but when the payment was stopped Safeco returned the check to Taylor Bean. CP 113. Safeco did not notify Taylor Bean of the payment error or request another check. *See* CP

41-43. Instead, Safeco sent Johnson a letter notifying him that it had not received payment from him and his policy would not be renewed if he did not send payment by January 5, 2009. CP 54. Johnson never saw that letter. CP 118 at ¶ 5.

Safeco's policy required it to provide notice to Taylor Bean prior to cancellation or nonrenewal. The policy provided that "[i]f the policy is cancelled or not renewed by us, the mortgagee will be notified *at least 20 days before the date cancellation or nonrenewal takes effect.*" CP 50 at 12.d (emphasis added).

On January 11, 2009, Safeco sent Taylor Bean a "Notice of Cancellation." CP 58. That notice stated the cancellation date was February 5, 2009. CP 58. On January 25, 2009, which was 11 days prior to the cancellation date, Johnson's house was destroyed by a fire. CP 117.

B. Safeco Denies Coverage when Johnson's Home is Destroyed in a Devastating Accidental Fire

In the middle of the night on January 25, 2009, Johnson's chimney caught fire when it overheated due to a hidden accumulation of creosote. CP 117, 323 at ¶ 2. The fire spread through the rest of his home and destroyed it. CP 323 at ¶ 2. Johnson might not have escaped dying in the fire but for the assistance of his neighbor. CP 1989 at line 1; *see also* CP 2021. Johnson was diagnosed with symptoms of Post-Traumatic Stress Disorder (PTSD) as a

result of his brush with death. CP 2021.

The fire marshal concluded the fire was accidental; Mount Vernon's investigation confirmed this. CP 323 at ¶ 2.

Johnson contacted Safeco for help immediately after the fire. CP 43 at ¶ 8 and CP 2021. Safeco erroneously told him that his renewal policy had been cancelled and there was no coverage. CP 43 at ¶ 8 and CP 2021.

This purported lack of insurance caused Mount Vernon's insurance policy with Taylor Bean to become effective.[1] CP 1989 at ¶ 6. Upon learning that Safeco had denied coverage for the fire that destroyed Johnson's home, Taylor Bean referred Johnson to Mount Vernon for coverage. CP 1989 at ¶ 6. After the fire, Taylor Bean charged Johnson at least $2,877 a year for this insurance coverage from Mount Vernon. CP 189-190 at ¶ 20; CP 406-408, *see also* CP 1056-1057.

Mount Vernon's insurance policy contract with Taylor Bean provided coverage to the homeowner (Johnson) for the cost of repairing the structure, the damage to personal property, and the cost of any additional living expenses due to the fire. CP 259, 261. It is undisputed that Johnson was a beneficiary of the Mount Vernon policy and was insured for the fire damage. *See* CP 322 at line 3, VRP 51 at lines 5-12.

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[1] Mount Vernon is a subsidiary of United States Liability Insurance Group and was sometimes referred to by its staff as USLI. *See* CP 196-7.

At the time of the fire, Johnson had very little income. CP 1992 at ¶ 18; CP 119-120 at ¶ 10. For 15 years he had been self-employed as a contractor doing specialized work at trade shows. CP 1992 at ¶ 18. But that work had become infrequent in the years leading up to the fire. *Id.* Johnson was also struggling to make payments on two mortgages. *Id.* at ¶ 19. In addition to the mortgage on the home that was destroyed by the fire, around 2008 he inherited his mother's house and the corresponding mortgage. *See* CP 1992 at ¶ 18-19 *and* CP 482-483 at pages 5-7.

Johnson had lived in the house that was destroyed for 25 years. *See* CP 1991 at ¶ 17. Most of his personal belongings were lost in the fire. *See id.* Johnson needed the help of his insurance companies to pay him for the repairs to the structure and for the cost of living somewhere else while he waited for the repairs to be completed. CP 119-20 at ¶ 8-13.

C. Mount Vernon Adjusts Johnson's Claim, But Wrongfully Refuses to Pay Johnson While It Argues with Safeco about the Cost of Repairs

Mount Vernon assigned three "adjusters" to handle Johnson's claim. Tony Brown was an independent adjuster located in Washington and employed by Cunningham Lindsey. CP 296-300. He was hired by Mount Vernon to adjust Johnson's claim. *Id.* Brown investigated the loss and was responsible for communicating with Johnson. CP 298-301; CP 1048 at lines 21-25. Maureen Connor was a Mount Vernon employee located in

Pennsylvania who gave directions to Brown. *See* CP 295-99; CP 1048 at lines 21-25. James Ziff was Connor's supervisor. CP 823 at ¶ 1.

Although Brown was responsible for meeting with Johnson and communicating with Johnson about his claim, Brown had no knowledge of Mount Vernon's coverage positions and had no authority to discuss coverage issues or policy restrictions with Johnson. CP 301, *see also* 1174-75 at lines 23-4 .

Brown inspected the damage and met with Johnson at the site of the fire on February 6, 2009. *See* CP 323 at ¶ 1-2. On February 23, 2009, one month after the fire, Brown prepared an estimate of the cost to repair the fire damage. CP 323 at ¶ 2. Two days later, Mount Vernon sent Johnson a payment for the full amount of that cost. CP 323 (February 25 note). But it did not honor this payment.

On March 4, 2009, Mount Vernon learned that Safeco's policy might also have been effective at the time of the fire. CP 324 at ¶ 2. As a result, Mount Vernon immediately cancelled its payment to Johnson for the structure repairs. CP 324 at ¶ 3. On April 27, 2009, Mount Vernon's independent adjuster, Brown, tendered Johnson's insurance claim to Safeco. CP 326 at ¶ 1.

1. Mount Vernon Convinces Safeco to Share Liability for the Structure

After being contacted by Mount Vernon, Safeco agreed to pay for part of the cost to repair the structure. CP 326 at ¶ 3. Safeco took the position that "coverage [was] extended for the mortgagee interest only" and that no contract was effective with Johnson at the time of the fire. CP 327 (June 12 note). Therefore, Safeco agreed to pay for the "structure only and will not include contents or ALE" coverage. *Id.*

It is unclear why Mount Vernon's involvement caused Safeco to change its position. If Safeco believed it had an obligation to cover the structure damage, but not the personal property and ALE, it should have agreed to pay for the structure repairs when Johnson called them immediately after the fire. Safeco has not offered any explanation for this inconsistency.

2. Mount Vernon Refuses to Pay Johnson Any Money for Structure Repairs Until Nine Months after the Fire

A dispute arose between Mount Vernon and Safeco concerning how much repairing the house would cost. CP 307-308. On May 27, 2009, Connor told Johnson that the cost for the structure repair was "being handled by us and Safeco." CP 307; CP 328 at ¶ 1. Brown did not agree with Safeco's estimate and this dispute lasted until October 8, 2009. CP 307-09,

318. As a result, and after canceling its initial payment, Mount Vernon refused to make any payment at all for the structure repairs until October of 2009. CP 318. This was nine months after the fire.

D. Mount Vernon Fails to Disclose a Restriction on the Coverage for Additional Living Expenses

Like other homeowner insurance policies, the Mount Vernon policy provided coverage for the additional living expenses (ALE) incurred by a homeowner in order to maintain his or her normal standard of living. CP 261 at D.1. Such ALE would include renting another house while awaiting the repair of the damaged house. *See id.*

Immediately after the fire, Johnson told Brown that he had moved into his own rental property rather than a rental home owned by another landlord. CP 1190 at line 2. Connor noted that Johnson "has a rental property in the area which he is using to mitigate his exposure (ALE)." CP 323 (February 24 note). Brown told Johnson that it was fine to live in his own rental property. CP 1190 at line 3; *see also* CP 1174.

But Mount Vernon changed its position when Johnson asked why he had not received any ALE payments. CP 328 at ¶ 1. On May 27, 2009, four months after the fire, Mount Vernon told Johnson that it would not compensate him for the cost of living in his *own* rental property. *Id.* Mount Vernon took the position that living in his own rental property, rather than a

rental property owned by someone else, did not constitute an increase in expenses under the policy language. CP 328 at ¶ 5.[2]

All three of Mount Vernon's adjusters, Connor, Brown and Ziff, testified that Johnson was wrongfully allowed to believe that he would be compensated for the cost of living in his own rental home. CP 1048, 1174, 1179-81. This result was inevitable because Brown, the only person responsible for meeting and communicating with Johnson, had no authority to discuss the parameters of coverage with Johnson. CP 301, 1174-75.

1. Johnson Accuses Mount Vernon of Misrepresenting the Coverage Restriction

Johnson informed Mount Vernon that his rental home cost him about $1,800 month. CP 1477. He explained that this number was based on his monthly mortgage payment. CP 329 at ¶ 1. When Mount Vernon refused to pay Johnson any money for his additional living expenses, Johnson accused Mount Vernon of "misrepresenting" the policy provisions. *Id.*

As a result, on May 29, 2009, Ziff intervened and agreed to pay Johnson $1,250 a month for additional living expenses. *Id.* at ¶ 5. Ziff noted that "we will owe more." *Id.*

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[2] This is in spite of the fact that, due to his occupancy of it, Johnson was necessarily unable to rent the residence in which he was staying.

2. After Mount Vernon Agrees to Pay $1,250 a Month for Additional Living Expenses it Refuses to Honor that Agreement

After Ziff agreed to pay Johnson $1,250 a month for additional living expenses, Mount Vernon never made another ALE payment. Months passed and Johnson continued to wait for Mount Vernon's payment for the structure and the ALE, as promised. *See* CP 379 at ¶ 1; CP 382 at ¶ 2. When Johnson asked Ziff for the unpaid ALE on September 21, 2009, Ziff simply refused to pay him any money at all for ALE. CP 332 at ¶ 2. Ziff accused Johnson of being non-responsive and delaying the repair of his house. *Id.* But Ziff's accusations were not well-founded.

It is true that, after Johnson had accused Mount Vernon of misrepresenting the policy terms, Johnson did not return three of Brown's phone calls.[3] Ziff asserted that this had delayed the structure claim. CP 332 at ¶ 2. But Brown testified that Johnson never failed to cooperate and that Johnson's three missed phone calls actually did nothing at all to delay the resolution of the structure claim. CP 356, 361; *see also* CP 309, 358. Ziff's belief that Johnson had been non-responsive was actually due to a communication breakdown between Brown and Connor. CP 316-17; *see*

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[3] Brown left voicemails for Johnson on June 12, June 29 and July 10, 2009. Johnson called Brown on August 5, 2009. CP 1458-59 (Brown's log notes, *see* CP 1353 at ¶ 2).

also CP 311-14. In fact, due to that communication breakdown, Connor had planned on closing Johnson's file without paying Johnson *any* money for the structure repairs. *Id.*

E. Johnson's Financial Situation is Dire and He Retains Legal Counsel and a Public Adjuster to Assist with His Claim

Throughout the claim, Johnson had minimal income and was in desperate need of money. *See* CP 1992 at ¶ 18-20. Johnson had largely exhausted his retirement account and could not afford his increased cost of living as a result of the fire. *Id.* Due to Mount Vernon's delays, Johnson was forced to seek assistance from the Department of Social and Health Services just to buy food to survive. *Id.*

In October 2009, after Ziff had explicitly refused to pay any more ALE money, Johnson retained a public adjuster and attorneys to assist him with his claim. CP 1991 at ¶ 16.

F. Ten Months after the Fire, Johnson Creates a False Written Lease in a Desperate Attempt to Persuade Mount Vernon to Pay What It Owed to Him

It is undisputed that in 2008 and around the time of the fire, Johnson had tenants living in one of the two units in his rental house. CP 1189-90. The tenants' names were Dean Peter Little and Yvonne Calizar. *Id.* Little and Calizar did not sign a written lease with Johnson, so there was no record of them renting from him. *Id.*

Desperate for funds just to survive, Johnson arrived at the misguided belief that Mount Vernon would finally pay him for his additional living expenses if only he could produce a written lease. This belief was the result of his conversations with Ziff and Connor. Specifically, Ziff told him that Mount Vernon was not obligated to pay him any money for ALE because "You didn't have it rented, and you didn't document that you could have had it rented." CP 1170 at line 10. On May 27, 2009, Connor informed him that his rental home did not appear to be covered because "there is no way for him to prove the rental would have been occupied by paying tenants" and "there was no lease/agreement that was cancelled due to the loss." CP 328 at ¶ 7-8. It is unclear why Ziff and Connor were fixated on whether Johnson could provide proof of renters. On September 21, 2009, Ziff explicitly refused to pay him any money for ALE. CP 332 at ¶ 2.

As a result of Ziff and Connor's statements and Mount Vernon's continued refusal to pay what it owed, sometime around November 2009 (about 10 months after the fire), Johnson fabricated a written lease to prove that Little and Calizar had lived in the rental home. CP 832-33; *see also* CP 385-86. Johnson did this without the knowledge of his attorneys. The lease incorrectly stated that Little and Calizar had rented the whole property for $1,800 per month. CP 832. In fact, they had only rented the downstairs part of the house for $750. CP 1190 at ¶ 3. The written lease also contained

several detectible errors. First, the address in the lease was incorrect and stated the property was in Edmonds instead of Seattle.[4] CP 832; *see also* CP 467 at lines 7-8. Second, the first page of the lease was dated 2008 but the top of the second page of the lease contained a 2009 copyright. *See* CP 831 at line 11; *and compare* CP 832-33 *with* CP 835. These discrepancies caused Mount Vernon to question the authenticity of the lease. CP 467 at lines 5-8.

1. Mount Vernon Reviews the Written Lease But Nonetheless Confirms its Denial of Coverage for Additional Living Expenses

On November 25, 2009, Johnson's attorneys sent a letter to Mount Vernon requesting that it pay Johnson $1,800 per month for additional living expenses. CP 385-86. Enclosed with that letter was a survey of prices for rental houses comparable to the fire-damaged property and a copy of the false lease. *Id.* This was the only time the false lease was submitted to Mount Vernon. At the time, Johnson's attorneys did not realize that the lease had been fabricated.

In response to the letter seeking payment for ALE, Connor sent a December 1, 2009 letter that re-affirmed Mount Vernon's denial of coverage for the loss of income caused by Johnson living in his own rental home. CP

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[4] Johnson's fire-damaged house was located in Edmonds. CP 322. But the rental house where Little and Calizar lived, and where Johnson lived after the fire, was in Seattle. CP 943-44, 1149.

388-90. Connor's letter also explained that Johnson was supposedly not owed any payments for additional living expenses after June 2009 because he had failed to cooperate and failed to repair his house. CP 390 at ¶ 4. The letter did not explain how Johnson was expected to repair his house prior to receiving any money from Mount Vernon for the structure repairs.

2. Mount Vernon Pays the $1,250 to which It Had Agreed Only after Johnson's Attorneys Send a Notice under the Insurance Fair Conduct Act

On December 18, 2009, Johnson's attorneys sent Mount Vernon a letter notice under the Insurance Fair Conduct Act (IFCA) demanding that Mount Vernon pay $1,250 a month for ALE, the amount to which Ziff had agreed in May 2009. CP 392-93. In response, Ziff sent a January 7, 2010 letter agreeing to finally pay Johnson $1,250 for the additional living expenses that he incurred during the prior six months. CP 334 at ¶ 4.

That was Mount Vernon's last ALE payment. Although Johnson's house still had not been repaired, Mount Vernon never made another ALE payment to Johnson after January 2010. *See* CP 766 at line 18 to CP 767 at line 5. Ziff testified under oath that, during a telephone call with Johnson's attorney, Timothy Bearb, they settled the entire ALE portion of the claim such that Mount Vernon would not be obligated to pay any more ALE funds, no matter how much time passed before the repair of Johnson's home. CP 766 at line 18 to CP 770 at line 1. Bearb testified that no such telephone

settlement occurred. CP 941-42. No correspondence was ever exchanged between Ziff and Bearb confirming the alleged settlement. CP 942 at ¶ 5.

G. Johnson is Forced to File this Lawsuit to Enforce his Rights against Safeco and Mount Vernon

Around January 23, 2010, Johnson filed suit against Safeco. *See* CP 339 at ¶ 3. On May 24, 2010, Johnson filed his First Amended Complaint and named Mount Vernon and Taylor Bean as additional defendants. CP 1. On June 1, 2010, Taylor Bean notified the parties of its bankruptcy and the automatic stay on all proceedings relating to Taylor Bean. CP 12.

H. Mount Vernon Fails to Fully Pay Johnson's Structure Claim Until Two Full Years after the Fire

Johnson's public adjuster, Roger Howson, was retained in October 2009. CP 1991 at ¶ 16. Howson arranged for Konrad Koss to estimate the cost of repairs. *See* CP 398. Koss determined that the cost to repair the house was $210,729, which was much more than Safeco or Mount Vernon had asserted. *Id.* Accordingly, Howson scheduled a re-inspection of the structure with Mount Vernon and Safeco in order to determine whether their estimates were accurate. CP 335 at ¶ 6-7. Safeco's adjuster missed that first re-inspection meeting. CP 337 at ¶ 1; *see also* CP 336. Brown missed the second re-inspection meeting. CP 341 at ¶ 2. Finally, on July 6, 2010, which was 17 months after the fire, Safeco and Mount Vernon agreed that

their original estimates were wrong and that the actual cost to repair the house was approximately $204,442. CP 342 at ¶ 4-5. This was $80,000 more than Mount Vernon's original estimate of $133,041. CP 323 at ¶ 2. It was $50,000 more than Safeco's original estimate of $157,744. CP 351.

After finally agreeing that its original estimate was wrong, Mount Vernon waited to issue a supplemental payment for its share of the cost of repairs until February 9, 2011—a full two years after the fire. CP 373; *see also* CP 342 at ¶ 5. As a result of the extensive delay, Johnson's house was never repaired. CP 1991 at ¶ 13.

I. The Trial Court Misinterprets Washington Law and Dismisses Johnson's Bad Faith and CPA Claims against Safeco and Mount Vernon

On January 7, 2011, the Superior Court granted Safeco's motion for summary judgment and dismissed all claims against Safeco. CP 156-57. The trial court explained that "on the facts presented here, it appears that Taylor Bean is the liable entity now." VRP 3 at line 15. Due to the bankruptcy of Taylor Bean, Johnson voluntarily dismissed it as a party and was left to pursue Mount Vernon as the only remaining defendant. CP 185-86.

On or about September 8, 2011, Mount Vernon notified Johnson's counsel that it had discovered that the written lease was not authentic. CP 846 at ¶ 5. Mount Vernon took the position that this misrepresentation should result in the dismissal of all Johnson's claims, regardless of the fact

that Mount Vernon's unlawful conduct occurred long before Johnson fabricated the lease in a desperate attempt to obtain what he was owed. CP 452-53. This new argument was raised by Mount Vernon less than a month prior to trial, which had been set for October 3, 2011. VRP 32, at line 11. Mount Vernon had "initially thought the lease submitted by [Johnson] was itself questionable as a legitimate lease." CP 467 at lines 5-8. Johnson's attorneys complained that Mount Vernon had withheld information during discovery and that Mount Vernon should have revealed its misrepresentation defense. CP 839 at lines 1-19; CP 846-49 at ¶ 5-26; CP 892.

On or about September 8, 2011, and again on October 6, 2011, Mount Vernon reported Johnson to authorities so that he would be criminally prosecuted for creating the written lease. CP 2018 at ¶ 2.

On September 23, 2011, just a week before the scheduled trial date, Mount Vernon amended its answer to include the affirmative defense that Johnson had made a material misrepresentation during the handling of his insurance claim. 963 at ¶ 13. A new judge was assigned to the case a week before trial. VRP 55 at lines 14-19. On the first day of trial, before *voir dire*, the Superior Court granted Mount Vernon's CR 50 motion to have all Johnson's claims dismissed, including his claims for bad faith and violation

of the Consumer Protection Act. VRP 121-24; *see also* CP 1106.[5]

This appeal follows.

ARGUMENT

I. ARGUMENT CONCERNING SAFECO

Safeco received a check for Johnson's premium, but Taylor Bean wrongfully stopped payment before the funds were transferred from Johnson's escrow account. Under Washington law, an insurance contract was created regardless of whether the payment was later stopped.

Safeco had a statutory duty to notify both Taylor Bean and Johnson prior to canceling the policy due to lack of payment. Because Safeco failed to send a notice cancelling the policy prior to the fire, the policy was effective.

A. Standard of Review for Summary Judgment

Appellate review of a trial court's decision on summary judgment is

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[5] After the Superior Court dismissed Johnson's contractual and extra-contractual claims against Mount Vernon, Mount Vernon sought $190,000 as sanctions against Johnson and his attorneys on the basis that his entire lawsuit was frivolous. CP 1677. The Superior Court found the lawsuit was not frivolous because "Mount Vernon delayed payment of this claim for a lengthy period, and [committed] CPA violations." CP 1984 at ¶ 1. Notwithstanding this, the Superior Court sanctioned Johnson $22,500 for failing to admit to the falsity of the lease. CP 1986. Thus, in addition to dismissing Johnson's case, the Superior Court imposed monetary sanctions upon him. The sanctions ruling is not currently being appealed.

de novo. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002). The appellate court performs the same inquiry as the trial court. *Id.* The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Id.* The court may not grant summary judgment unless the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

B. Safeco's Renewal Insurance Contract was Formed at the Moment of its Issuance and Acceptance

1. Issuance of a policy creates an effective insurance contract

A policy becomes effective upon its issuance. The seminal case in Washington is *Frye v. Prudential Insurance Co.*, 157 Wn. 88, 288 P. 262 (1930). In *Frye*, the insured agreed to pay for a life insurance policy and the policy was then mailed to him. *Id.* at 89-90. But the insured died before he could pay the premium or receive the policy. *Id.* The court found that the policy was effective on the date it was mailed. *Id.* at 90-91, 95. Subsequent cases have relied on *Frye* and confirmed that issuance, rather than delivery, is all that is necessary for a policy to become effective. *Webster v. State Farm Mut. Auto. Ins. Co.*, 54 Wn. App. 492, 496, 774 P.2d 50 (1989); *McGreevy v. Or. Mut. Ins. Co.*, 74 Wn. App.

858, 866-67, 876 P.2d 463 (1994). Under the *Frye* rule, an insurance contract was formed when Safeco issued and sent Johnson a copy of his renewal policy on September 28, 2008.

2. Alternatively, a renewal insurance contract is formed through offer and acceptance

Even if the rule in *Frye* did not apply to renewal contracts (and there is no reason it should not), renewal contracts would nevertheless be formed through offer and acceptance. A contract requires offer, acceptance, and consideration. *Christiano v. Spokane County Health Dist.*, 93 Wn. App. 90, 95, 969 P.2d 1078 (1998). A contract exists when the intention of the parties is plain and the terms of a contract are agreed upon. *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983). If the terms are agreed upon, a contract exists even if one or both of the parties contemplated later execution of a writing. *Id.* Acceptance is an expression, communicated by word, sign, or writing to the person making the offer, of the intention to be bound by the offer's terms. *Plouse v. Bud Clary of Yakima, Inc.*, 128 Wn. App. 644, 648, 116 P.3d 1039 (2005).

Here, Safeco made an offer to Johnson by mailing him a copy of the renewal policy. Johnson accepted the terms of that agreement when Taylor Bean, pursuant to its agreement with Johnson, sent a payment check on Johnson's behalf to Safeco. Accordingly, either by the renewal policy's

issuance or by the doctrine of offer and acceptance, an insurance contract between Safeco and Johnson was created. The later inadvertent cancellation of a single payment by Johnson's mortgage company does not obviate the creation of the contract.

C. Safeco was Obligated to Provide Notice Prior to Cancellation

1. An explicit notice of cancellation must be sent to the insured

Once an insurance policy is effective, Washington law requires strict conformance with the notice of cancellation statute prior to that policy's termination. RCW 48.18.290; *Olivine Corp. v. United Capitol Ins. Co.*, 147 Wn.2d 148, 161-63, 52 P.3d 494 (2002); *Cornhusker v. Kachman*, 165 Wn.2d 404, 410-11, 198 P.3d 505 (2008).

The statute requires that the cancellation notice provide "the insurer's actual reason for cancelling the policy." RCW 48.18.290(1)(a)(ii). If the cancellation is for nonpayment, that notice must be sent at least 10 days prior to the effective date of cancellation. RCW 48.18.290(1)(c).

2. At the same time, that notice of cancellation must also be sent to the mortgage company

The statute requires that the notice of cancellation must also be sent to the mortgage company named in the policy. RCW 48.18.290(1)(e). This must be "[l]ike notice," meaning that it must meet the same criteria and

contain the same information as the notice to the insured. *Id.*[6]

D. Safeco Did Not Send Timely Notices of Cancellation, So the Contract Remained Effective at the Time of the Fire

1. Safeco failed to send timely notice of cancellation to Johnson or Taylor Bean

Safeco did not send any explicit notice of cancellation to Johnson. Safeco's warning to Johnson that his policy *might* not be renewed did not constitute an explicit notice of cancellation. Further, Safeco's Notice of Cancellation to Taylor Bean was not sent until January 11, 2009. That Notice stated the cancellation date was February 5, 2009, which was after Johnson's house fire on January 24, 2009.

2. A policy that is not properly canceled remains effective

Where an insurer fails to comply with the notification statute, the cancellation is ineffective and the policy remains. *Olivine*, 147 Wn.2d at 163, 166. "The purpose of the notice requirements in the insurance code is to enable the insureds—all of them—to take appropriate action in the face of impending cancellation of an existing policy." *Id.* at 162.

Here, because Safeco failed to send an explicit cancellation notice to both Johnson and Taylor Bean setting a cancellation date prior to the

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[6] Here, Johnson's policy with Safeco (i.e., the insurance contract itself) also reflected this statutory requirement. The policy provided that "[i]f the policy is cancelled or not renewed by us, the mortgagee will be notified at least 20 days before the date cancellation or nonrenewal takes effect." CP 50 at ¶ 12.d.

fire, the cancellation was not effective prior to the date of the fire. Accordingly, Safeco's insurance contract was in force and effect at the time of the fire and Johnson's claims against Safeco should not have been dismissed on summary judgment.

E. Because the Insurance Contract was Effective at the Time of the Fire, Johnson's Claims Against Safeco Should Not Have Been Dismissed

The trial court dismissed Johnson's claims for breach of contract, bad faith, the Consumer Protection Act, and the Insurance Fair Conduct Act ("IFCA") (RCW 48.30.015) on the basis that Johnson did not have an effective insurance contract and therefore had no standing to assert those claims against Safeco. However, under well-established Washington law, the insurance policy contract *was* effective at the time of the fire and Johnson was entitled to assert claims for breach of contract, bad faith, the CPA, and the IFCA. Accordingly, the dismissal of Johnson's claims against Safeco by the Superior Court was error and should be reversed.

II. ARGUMENT CONCERNING MOUNT VERNON

A. Standard of Review of a CR 50 Directed Verdict

Prior to trial, the Superior Court granted Mount Vernon's motion to dismiss Johnson's claims as a matter of law pursuant to CR 50.

Appellate courts review a trial court's decision on a motion for

judgment as a matter of law using the same standard as the trial court. *Mega v. Whitworth College*, 138 Wn. App. 661, 668, 158 P.3d 1211 (2007) (citing *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). The trial court may not exercise discretion. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 98, 882 P.2d 703 (1994). A motion for judgment as a matter of law admits the truth of the opponent's evidence and all inferences that can reasonably be drawn from it. *Id.* Granting a motion for judgment as a matter of law is only appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Sing*, 134 Wn.2d at 29.

Here, there is overwhelming evidence that Mount Vernon acted in bad faith and violated the CPA. Johnson's misrepresentation did not occur until about 10 months after those violations began.

B. Mount Vernon Acted in Bad Faith and Violated the CPA during the 10 Months Prior to Johnson's Misrepresentation

1. Elements of bad faith and violation of the Consumer Protection Act

An insurer acts in bad faith when it places its own interests above the interests of its insured. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386, 715 P.2d 1133 (1986). Additionally, an insurer is liable for bad faith if its actions were unreasonable, frivolous, or unfounded. *Mut.*

of Enumclaw Ins. Co. v. Dan Paulson Const., Inc., 161 Wn.2d 903, 916, 169 P.3d 1 (2007). Such a breach of the duty of good faith sounds in tort. *Id.* at 915.[7]

An insurer's breach of the duty of good faith constitutes a *per se* violation of the CPA. *Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d 355, 359, 581 P.2d 1349 (1978).

2. Violation of WAC regulations also constitute per se bad faith and a violation of the CPA

In addition to the broad duty of good faith, insurers must follow the regulations set forth in WAC 284-30-330 through 800. As a matter of law, a violation of any one of the regulations set forth in WAC 284-30-300 through 800 constitutes a breach of the insurer's duty of good faith. *Rizzuti v. Basin Travel Service of Othello, Inc.*, 125 Wn. App. 602, 615-16, 105 P.3d 1012 (2005) citing *Am. Mfrs. Mut. Ins. Co. v. Osborn*, 104 Wn. App. 686, 697, 17 P.3d 1229 (2001).

Also as a matter of law, a single violation of any one of these WAC regulations is also an unfair or deceptive act or practice under the CPA. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 331, 2 P.3d 1029 (2000) citing *Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 924,

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[7] The duty to act in good faith and liability for acting in bad faith refer to the same obligation. *Tank*, 105 Wn.2d at 385.

792 P.2d 520 (1990).[8]

3. Mount Vernon acted in bad faith and violated the CPA when it failed to promptly pay Johnson

Mount Vernon unreasonably delayed any payment for the structure repairs for nine months and did not make full payment for those repairs until 24 months after the fire. But an insurer is obligated to pay claims promptly. This obligation arises from and the common law duty of good faith and from statute. An insurer that delays payment of a covered claim places its interest above that of its insured. This constitutes bad faith under *Tank*. *See* 105 Wn.2d at 386. Similarly, a delay that is unreasonable, unfounded or frivolous breaches the duty of good faith. *See Dan Paulson Const.*, 161 Wn.2d at 916. Moreover, under Washington law, a dispute over the apportionment of payment with another insurer is not a reasonable basis to delay payment to the insured:

> Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become

[8] To prevail in a private CPA action, the plaintiff must show that the defendant's conduct met the elements of the *Hangman Ridge* five-part test: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) impacting the public interest, (4) injuring plaintiff in his or her business or property, and (5) causation. *Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The second and third elements are automatically met in the context of insurance because it is a business which affects the public interest. *See* RCW 48.01.030. Therefore, in Washington, to prove an insurer violated the CPA, the insured only has to show that the insurer breached one of more of the WAC regulations and that the insured was injured by that breach. *Osborn*, 104 Wn. App. at 697-98.

> reasonably clear [is an unfair or deceptive act]. . . . If two or more insurers share liability, they should arrange to make appropriate payment, leaving to themselves the burden of apportioning liability.

WAC 284-30-330(6). The regulations further provide:

> Failing to adopt and implement reasonable standards for the processing and payment of claims after the obligation to pay has been established [is an unfair or deceptive act].

WAC 284-30-330(16). And further:

> Insurers must not fail to settle first party claims on the basis that responsibility for payment should be assumed by others except as may otherwise be provided by policy provisions.

WAC 284-30-380(4). Each of these claims handling regulations prohibited Mount Vernon's nine-month delay in payment for the structure repairs.

Mount Vernon's delay constituted bad faith, violated the WAC regulations, and, accordingly, violated the CPA.

4. Mount Vernon acted in bad faith and violated the CPA when it cancelled payment to Johnson

Mount Vernon cancelled its initial structure payment to Johnson *solely* for the purpose of seeking funds from Safeco. This action placed Mount Vernon's interests above Johnson's, which constitutes bad faith. *See Tank*, 105 Wn.2d at 386.

After canceling the payment, Mount Vernon tendered Johnson's claim to Safeco. In Washington, insurers may not tender claims to another insurer. "[T]he insurer who seeks contribution does not sit in the place of the

insured and cannot tender a claim to the other insurer." *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 421-23, 191 P.3d 866 (2008).

Mount Vernon's cancellation of payment and subsequent tender of the claim to Safeco violated Washington law and unnecessarily delayed payment of Johnson's structure claim for nine months. This constituted bad faith, which was a violation of the CPA.

5. Mount Vernon acted in bad faith and violated the CPA when it refused payment of additional living expenses to Johnson

After agreeing to pay Johnson $1,250 a month for ALE in May 2009, and after making an ALE payment at that time, Mount Vernon refused any further payment for Johnson's ALE. Mount Vernon's explanation was that, despite their May 2009 agreement, Johnson's lost rental income was not covered. Connor also accused Johnson of failing to cooperate. But Brown admitted that Johnson never failed to cooperate.

Mount Vernon's refusal to continue payment for ALE was unreasonable and unfounded. This breached its duty of good faith under *Dan Paulson*, 161 Wn.2d at 916, and under *Tank*, 105 Wn.2d at 386. This breach constituted a violation of the CPA.

6. Mount Vernon acted in bad faith and violated the CPA when it failed to disclose that Johnson's rental house would not be covered

Mount Vernon failed to promptly inform Johnson that it would not

compensate him for his lost rental income and that, instead of moving into a rental home that he owned, he should have moved into a rental home owned by someone else. All three of Mount Vernon's adjusters have expressly admitted this failure to disclose the details of Johnson's ALE coverage.

An insurer may not fail to disclose any benefit or coverage restriction:

> No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

WAC 284-30-350(1). Further:

> Misrepresenting pertinent facts or insurance policy provisions [is an unfair or deceptive act].

WAC 284-30-330(1).

As discussed above, a violation of any one of the regulations set forth in WAC 284-30-300 through 800 constitutes a breach of the insurer's duty of good faith and is an unfair or deceptive act for the purposes of the CPA. *Rizzuti*, 125 Wn. App. at 615-16; *Anderson*, 101 Wn. App. at 331; *Kallevig*, 114 Wn.2d at 924. By failing to inform Johnson that he should move into a different rental house after the fire, Mount Vernon breached its duty of good faith and violated the CPA.

7. But for Mount Vernon's failure to disclose the restriction on the rental house and its refusal to pay additional living expenses, Johnson's misrepresentation could not have occurred

If Mount Vernon had promptly informed Johnson that he should not move into a rental house he owned, he would have moved into a different rental house. *There would never have been a dispute concerning whether he was entitled to reimbursement for that rental cost.* Accordingly, there would have been no reason for Johnson, acting in desperation to obtain the bare essential living expenses owed to him by his insurer, to have submitted a false lease in order to prove that he had rented his house.

Mount Vernon intentionally created the dispute concerning ALE and lost rental income when it violated WAC 284-30-350(1). Mount Vernon should not be allowed to benefit from its intentional violation of the law. The trial court's dismissal of Johnson's claims had the unintended consequence of rewarding Mount Vernon for its wrongful conduct.

C. The Rule in Cox *Does Not Apply to Johnson's Extra-Contractual Claims Preceding the Misrepresentation*

1. The rule in *Cox* was established for public policy reasons

The decision of *Mut. of Enumclaw Insurance Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988) established that policy language that

voids the entire policy when an insured materially misrepresents their insurance claim is enforceable and, for public policy reasons, the insured should be barred from suing his or her insurance company for extra-contractual claims such as bad faith and violations of the Consumer Protection Act and the Insurance Fair Conduct Act.[9]

Less than two months after a house fire, the insured, Dr. Cox, submitted an inventory list that contained many fraudulent items that were not actually destroyed in the fire. 110 Wn.2d at 645-46. These fraudulent items included jewelry, a television and bronze statutes totaling $30,000-$40,000 in value. *Id.* at 646. As a result of this fraud, the insurer promptly filed a declaratory judgment action against Dr. Cox to enforce the policy provision that stated "[t]his entire policy is void if . . . [t]here has been fraud or false swearing by an insured." *Id.*

In response to the declaratory judgment action, Dr. Cox filed counter-claims for bad faith and violation of the CPA. *Id.* at 646-47.

The jury found that Dr. Cox had committed fraud or false swearing. *Id.* at 647. But the jury also found that the insurer had acted in

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[9] The Insurance Fair Conduct Act did not become law until 2007, but the parties agree that the rule in *Cox* applies equally to bad faith, CPA, and IFCA claims. *See* VRP 163-164 at lines 23-6. Because Mount Vernon paid the outstanding ALE claim in response to Johnson's IFCA notice, no IFCA claim is at issue in this appeal.

bad faith, violated in the CPA and should be estopped from voiding the policy. *Id.* at 647-48. The trial court found that Dr. Cox was barred from that estoppel theory and granted a judgment notwithstanding the verdict in favor of the insurer. *Id.* at 648.

It does not appear the jury had a sufficient basis for its findings of bad faith and violation of the CPA. Indeed, a later decision by the Washington Supreme Court confirmed that *there was no evidence of bad faith or violation of the CPA* by the insurer in *Cox*. *Ellis v. William Penn Life Assur. Co. of Am.*, 124 Wn.2d 1, 14, 873 P.2d 1185 (1994). The *Ellis* opinion explained that "[*Cox* and another case] involved misrepresentations only by the insured parties, and *in neither case did the insurer commit any wrongful act*." *Id.* (emphasis added). As a result, the *Cox* decision affirmed the dismissal of Dr. Cox's bad faith and CPA claims with the following ruling:

> Cox contends that a finding of fraud should not preclude his recovery of damages for MOE's Consumer Protection Act (CPA) violation based on its bad faith and failure to comply with Washington Administrative Code provisions. Cox asserts that allowing the insurer to escape liability under the CPA will be catastrophic for the consumer and that the CPA's purpose is to protect insureds from actions such as MOE's bad faith.
>
> However, the purpose of the CPA will not be served by awarding damages, attorney fees, and costs to Cox after he tried to perpetrate a fraud on MOE. Furthermore, legal mechanisms exist to punish insurers guilty of CPA

> violations since insurers are subject to the enforcement powers of the State Insurance Commissioner. We consider this regulation by the Insurance Commissioner to be an adequate deterrence against bad faith by insurance companies. We need not further punish MOE when to do so would provide a windfall to one guilty of fraud.
>
> . . .
>
> The CPA exists to protect consumers, not to aid and abet fraud. We hold that Cox is not entitled to recovery under the CPA

Cox, 110 Wn.2d at 652-653. Accordingly, for public policy reasons, the *Cox* decision extended the 'void for fraud' provision to also bar the extra-contractual remedies of bad faith and the CPA.[10]

2. The rule in *Cox* does not apply when an insurer violates the CPA or acts in bad faith *prior to* a misrepresentation

Division I of the Court of Appeals has concluded that *Cox* does not apply to insurer misconduct when it occurs prior to a misrepresentation. In *Strother v. Capitol Bankers Life Insurance Co.*, 68 Wn. App. 224, 842 P.2d 504 (1992), Judge Forrest wrote for the Court that *Cox* does not apply if an insurer violates the CPA prior to an insured making a

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[10] Notably, the rationale underlying the Cox decision is inapplicable here. Specifically, it is undisputed that the Office of the Insurance Commissioner (OIC) will not enforce the claims handling regulations against Mount Vernon or Safeco, notwithstanding their bad faith conduct. The OIC does not have the authority or resources to take action against Mount Vernon or Safeco. *See* CP 1350-51. The OIC has limited authority and resources to protect consumers from individual instances of wrongful conduct. *Id.* Actions by consumers against their insurers are the only substantial deterrent that exists to prevent insurers from acting in bad faith and ignoring the insurance regulations.

misrepresentation. 68 Wn. App. at 241. The logic applied in the *Strother* decision is persuasive. The Court explained that:

> Most significantly, however, the alleged unfair practice [by the insurer] in the case at bar preceded, and in fact likely contributed to, any misrepresentations on [the insured's] part. . . . In contrast, the fraud in *Mutual of Enumclaw* [*v. Cox*] preceded any bad faith handling of the claim. It would contradict the purpose of the Consumer Protection Act to extend the rule of *Mutual of Enumclaw* to the case at bar.

Id. (emphasis omitted). Here, the Superior Court's dismissal of Johnson's claims is contrary to the logic applied in the *Strother* decision because Mount Vernon's wrongful conduct preceded, and contributed to, the misrepresentation by Johnson.

After explaining why *Cox* did not apply, the *Strother* decision nonetheless affirmed the dismissal of the insured's CPA claim because the trial court had found that there was no proof of causation and the insured had failed to cross-appeal on that issue. *Id.* at 244-45. Instead, the *Strother* decision remanded the case so that the insured could seek recovery under a negligence theory. *Id.* at 246.

The *Strother* decision was reversed on other grounds by *Ellis v. William Penn Life Assur. Co. of Am.*, 124 Wn. 2d 1, 873 P.2d 1185 (1994) (reviewing *Strother sub nom.*; hereafter "*Ellis*"). The *Ellis* decision did not evaluate the issues analyzed in the *Strother* decision. Instead, the *Ellis*

opinion was based on the fact that, in the context of life insurance, a denial of benefits may affect innocent parties who played no role in the misrepresentation. *Id.* at 14-16. This unique aspect of life insurance was not an issue addressed in *Strother*. Thus, the *Ellis* decision neither reversed nor criticized the *Strother* opinion's remarks concerning *Cox*.

In fact, both the *Ellis* opinion and the *Strother* opinion refused to apply the rule in *Cox*. *Id.* at 14. The *Ellis* opinion explained: "The estoppel issue in [*Cox*] is distinguishable from that in these cases, where wrongful acts were committed by both the insureds and the insurers, and the wrongful acts committed by the insurers are clearly in violation of insurance regulations." *Id.* In her dissenting opinion, Justice Madsen stated that the analysis applied in *Strother* offered a better rule for protecting insureds with unclean hands when their insurer violated the insurance regulations. *Id.* at 19 and 25.

Another instructive case is *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 36 P.3d 1065 (2001). In that case, the court likewise held that an insured's misrepresentation was immaterial because it occurred after the settlement of the insurance claim. *Id.* at 415-6.

The opinions of *Strother* and *Barton* distinguished *Cox* based on the timing of the misrepresentation. The *Ellis* opinion also distinguished *Cox* because, unlike in *Cox*, the insurers in *Ellis* had clearly violated the insurance

regulations. These rulings confirm that timing *does* matter and that an insurer cannot escape liability for bad faith and violations of the insurance regulations that precede a misrepresentation made by the insured.

3. No Washington court has ever applied *Cox* to conduct preceding a misrepresentation

No Washington court has ever applied *Cox* retroactively—i.e. to preclude bad faith or CPA claims for conduct that occurred prior to the misrepresentation. Attached as Appendix A is a chart based on a survey of all published decisions that cite *Cox* and involve a misrepresentation made during a claim. *None* of those cases applied the rule in *Cox* to preclude extra-contractual claims where, as here, an insurer violated the CPA and acted in bad faith many months prior to the insured's misrepresentation. Nor have any courts applied the rule in *Cox* to preclude extra-contractual claims where, as here, the wrongful conduct of the insurer contributed to the misrepresentation. In short, if the Superior Court's decision in this matter is affirmed, it will be the *first* appellate opinion to extend the rule in *Cox* to excuse insurers for bad faith and CPA violations occurring prior to a misrepresentation. This expansion of *Cox* would be a significant change to Washington law as it currently exists.

4. Public policy reasons weigh heavily against a retroactive application of *Cox*

The rule in *Cox* barring extra-contractual remedies was established

for public policy reasons. Accordingly, this Court should examine the public policy implications prior to expanding the rule in *Cox*.

The Office of the Insurance Commissioner testified in this matter that it does not have the authority or resources to prosecute insurers such as Mount Vernon for their wrongful conduct in individual claims. CP 1350-51. As a result, actions by insureds such as Johnson are the *only* mechanism that exists to hold insurers accountable when they commit bad faith and violate the insurance regulations.

Insurer bad faith and violations of the insurance regulations are a widespread problem in Washington. Both the electorate and the legislature acknowledged this problem when they passed Referendum 67, the Insurance Fair Conduct Act. RCW 48.30.015. IFCA established a new extra-contractual claim and established punitive damages in order to deter misconduct by insurers—precisely the type of bad faith conduct at issue in this case. The rule in *Cox* barring extra-contractual remedies will likely also bar legitimate IFCA actions.

In contrast, there is no public policy reason for expanding the rule in *Cox*. Insurer bad faith and violation of the insurance regulations are a widespread problem that should be deterred.

5. Insurers should be held accountable, even when policy holders mistakenly "fight fire with fire" in self-defense

It is predictable that insureds who believe their insurance companies are behaving dishonestly may respond with a desperate, and dishonest, act themselves in an attempt to counter the wrongful conduct of their insurer. An insurer that commits bad faith should not escape liability when the insured resorts to a dishonest act in self-defense.

The Supreme Court has recognized that otherwise honest people may be driven to lie to their insurer when placed in difficult circumstances. *Pencil v. Home Ins. Co.*, 3 Wn. 485, 28 P. 1031 (1892). In *Pencil*, the Supreme Court found that an insured's attempt to bribe witnesses during an arson investigation, though fraudulent, did not void the policy because it was the result of "duress" and because the jury found the insured did not commit arson. *Id.* at 494.

Sometimes a policy holder's judgment may be impaired because they are in an impossibly desperate position during a claim. For example, a parent who has suffered a house fire and is struggling to prevent his or her family from becoming homeless might lie in response to an insurer's misconduct. Such desperate acts, while they are certainly wrong and should be

sanctioned,[11] should not absolve the insurer of its misconduct.

6. A retroactive application of *Cox* will give insurers a perverse incentive to abuse their policy holders

Applying *Cox* to misconduct that precedes a misrepresentation will give insurers a perverse incentive to abuse their most desperate policy holders, because desperate policy holders might be driven to make a misrepresentation in self-defense.

Insurance companies are rational actors. They are profit-motivated entities and their behavior is determined by an actuarial evaluation of the costs and benefits of potential business strategies. If *Cox* is expanded in a way that rewards or protects insurers that abuse desperate policy holders, insurance companies will alter their behavior accordingly. For example, an insurer might under-staff its Washington offices if it believes that there is a lower risk of penalty when its staff mishandles claims.

Notably, the rule in *Cox* does not just protect insurers; it can also reward them. In some cases, the insurance company may force the insured to disgorge all of the insurance proceeds received for a covered claim because a small part of the insured's claim was fraudulent. *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 517-18, 8 P.3d 1273 (2005) (where

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[11] Again, Johnson was independently sanctioned by the Superior Court in this action. CP 1986.

insureds claimed personal property damage that did not exist, entire policy was void so court ordered the return of all payments for legitimately claimed real property damage).

It is well-established that insurance law should avoid creating perverse incentives. Classic examples are the principle of moral hazard[12] and the corresponding rule that an insured must have an insurable interest.[13] Likewise, this Court should not expand *Cox* in such a way that creates an incentive for insurers to abuse their insureds during a claim.

7. Independent of Cox, there exist strong mechanisms for punishing policy holders who commit fraud or lie during litigation

The trial court sanctioned Johnson for failing to admit to the creation of the lease in this matter. While Mount Vernon acknowledges it did not rely on the lease to its detriment and was not harmed by it, Johnson must still pay $22,500 for his lie. Given Johnson's grave financial situation, Mount Vernon's ability to garnish $22,500 from his bank accounts may leave him penniless.

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[12] Moral hazard is "the tendency of an insured party to exercise less care to avoid insured losses than that party would exercise if the losses were uninsured." *Am. Nat. Fire Ins. Co. v. B & L Trucking and Const. Co., Inc.*, 134 Wn.2d 413, 433, 951 P.2d 250 (1998).

D. The Cox Rule Should Not be Expanded Because the Duty of Good Faith and the CPA Are Construed Liberally and Extend Beyond the Parameters of the Insurance Contract

Mount Vernon should not escape liability for misconduct that preceded Johnson's misrepresentation. To do so would undermine the purpose of the CPA and the tort of insurance bad faith.

Subsequent to the *Cox* decision, the Washington Supreme Court has clarified that that the CPA extends beyond the parameters of any contract. This is because there is a "statutory mandate to liberally construe the CPA in order to protect the public" from the unfair and deceptive acts of insurance companies. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 54-55, 204 P.3d 885 (2009); RCW 19.86.920.

Due to this liberal construction, a CPA action may be brought by a plaintiff that was not a party to the underlying business transaction. *Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 312, 858 P.2d 1054 (1993); *Panag*, 166 Wn.2d at 41-44.

> A contractual relationship is not an element of a CPA claim. The Washington Supreme Court has confirmed that "any person who is injured" may sue under the statute, regardless of whether there is privity of contract.

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[13] The doctrine of insurable interest "is designed to protect against societal waste and to avoid the danger in allowing persons without an insurable interest to purchase insurance, because those persons might then intentionally destroy lives or property." *Gossett v. Farmers Ins. Co. of Washington*, 133 Wn.2d 954, 969, 948 P.2d 1264 (1997); *see also* RCW 48.18.040.

Lease Crutcher v. Nat'l Union Fire Ins. Co., C08-1862RSL, 2009 WL 3444762 *5 (W.D. Wash. Oct. 20, 2009) (order on motion to dismiss) (citing *Fisons*, 122 Wn.2d at 312-13).

Similarly, a claim for bad faith does not require a direct contractual relationship. Third-party beneficiaries to an insurance policy may bring an action for insurance bad faith despite the fact that they are not party to the insurance contract. *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 384-388, 743 P.2d 832 (1987), *review denied*, 109 Wn.2d 1025 (1988), *overruled on other grounds by Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 781, 15 P.3d 640 (2001).

E. In Addition to the Timing of the Misrepresentation, this Case is Distinguishable from Cox *Because the Policy Was Not Voided*

The rule in *Cox* should not apply to Johnson's case because the applicable policy term is distinguishable from the policy term in *Cox*. In *Cox*, the policy language stated that "[t]his entire policy is void" in the event of a misrepresentation. 110 Wn.2d at 646. However, in this case, the trial court dismissed Johnson's claim based on the policy language that stated "[w]e provide coverage to no insureds" in the event of a misrepresentation. CP 1657 at ¶ 2 (referencing CP 1431 at ¶ Q). But the loss of coverage cannot preclude claims for bad faith and violation of the CPA. As discussed above, claims of bad faith and violation of the CPA are

"extra-contractual" in nature because they do not require a direct contractual relationship and provide remedies beyond the claim of breach of contract.

Moreover, the remedies for bad faith and CPA violations may not be restricted by an insurance policy's terms. For example, an insured's breach of the suit limitation deadline in an insurance policy does not preclude claims for bad faith and CPA violations. *O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. App. 516, 529-31, 125 P.3d 134 (2004) (where suit limitation had expired, but statutes of limitation for CPA and bad faith had not expired, insured may bring action for violation of CPA and bad faith), citing *Simms v. Allstate Ins. Co.*, 27 Wn. App. 872, 878, 1 P.2d 155 (1980). Another example is that, even when no coverage exists, an insurer is still liable if it acts in bad faith or violates the Consumer Protection Act. *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998).

III. APPELLANT IS ENTITLED TO ATTORNEY FEES

Appellant Johnson respectfully requests the award of attorney fees and all litigation costs and expenses incurred through this appeal pursuant to RAP 18.1.

Johnson is entitled to his attorney fees and litigation costs from Mount Vernon pursuant to the Consumer Protection Act. RCW 19.86.090.

Johnson is entitled to his attorney fees and litigation costs from

Safeco pursuant to the Consumer Protection Act (RCW 19.86.090), the Insurance Fair Conduct Act (RCW 48.30.015) and *Olympic Steamship v. Centennial Ins.*, 117 Wn.2d 37, 52-53, P.2d 673 (1991).

CONCLUSION

Both Safeco and Mount Vernon had undisputed obligations to provide immediate payment to Johnson so he could begin repairs to his home. Their failure to perform their obligations multiplied the severity of Johnson's disaster and may have exacerbated his PTSD. Through no fault of his own, Johnson was drawn into a Kafkaesque nightmare as his two insurance companies spent nine months bickering over how much to pay him, while actually paying him nothing. He was given false information on where he should live and was denied payment for his additional living expenses. Meanwhile, he exhausted his retirement account and needed government assistance just to pay for food.

These events left him in a seemingly impossible position. In a desperate act of bad judgment, he fabricated a document to prove he had renters. That document is precisely what Connor and Ziff told him was necessary before Mount Vernon would pay him for the cost of living in his rental home.

Mount Vernon should not be absolved of its bad faith conduct and its violations of the CPA because of a single, post-violation act of bad

judgment by Johnson. To do so would be to reward Mount Vernon for disregarding its obligations to a vulnerable person after a devastating fire. And it would punish Johnson for being a victim of a fire and of bad faith conduct by his insurance company, *in addition* to being sanctioned for his conduct. The dismissal of Johnson's bad faith and CPA claims against Mount Vernon should be reversed and remanded for trial.

Similarly, Safeco should not be permitted to escape its obligations to its insureds unless it provides explicit and timely notices of cancellation to both the insured and the mortgagee, as required by law. Otherwise, those parties will not have the opportunity to remedy the problem and, in this case, pay the premium. The dismissal of Johnson's claims against Safeco should also be reversed and remanded for trial.

RESPECTFULLY SUBMITTED this 25th day of May 2012.

JOEL B. HANSON, ATTORNEY
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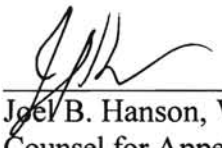

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Appendix A - Survey of Washington State Cases Involving
Material Misrepresentations Made by an Insured During an Insurance Claim

This chronological chart includes all published cases that have cited *Cox* concerning an insured's misrepresentations made during a claim. The cases in this chart show that no Washington decision has ever found that *Cox* bars claims for bad faith preceding a misrepresentation.

While this chart includes some cases involving a misrepresentation made in the insurance policy application, this chart does not include all the cases involving a misrepresentation in the application because such misrepresentations necessarily occur prior to the claim (unlike the issue presented in the instant case).

Name and Citation	**Timing of Misrepresentation in Relation to Bad Faith**	**Nature of Misrepresentation**	**Nature of Bad Faith Alleged**	**Ruling**
McAlpine v. State Farm Fire and Cas. Co., No. C10-5630BHS, 2011 WL 6370209 (W.D. Wash. Dec. 20, 2011) (order on motion for summary judgment)	Bad faith not specified in ruling (But arson must have occurred prior to any alleged bad faith)	During investigation of restaurant arson, insured falsely denied trying to sell the restaurant and made false statements concerning the financial status of the restaurant	Not specified	Whether misrepresentations were intentional was question for jury
Bronsink v. Allied Property and Cas. Ins. Co., No. C09-751MJP, 2010 WL 2342538 (W.D. Wash. June 8, 2010) (order on motion for summary judgment)	Bad faith after exaggeration of loss	Exaggerated or falsified list of personal property contents	WAC violations and denial of coverage	Elements of falseness, materiality, and intent of misrepresentation were questions for jury

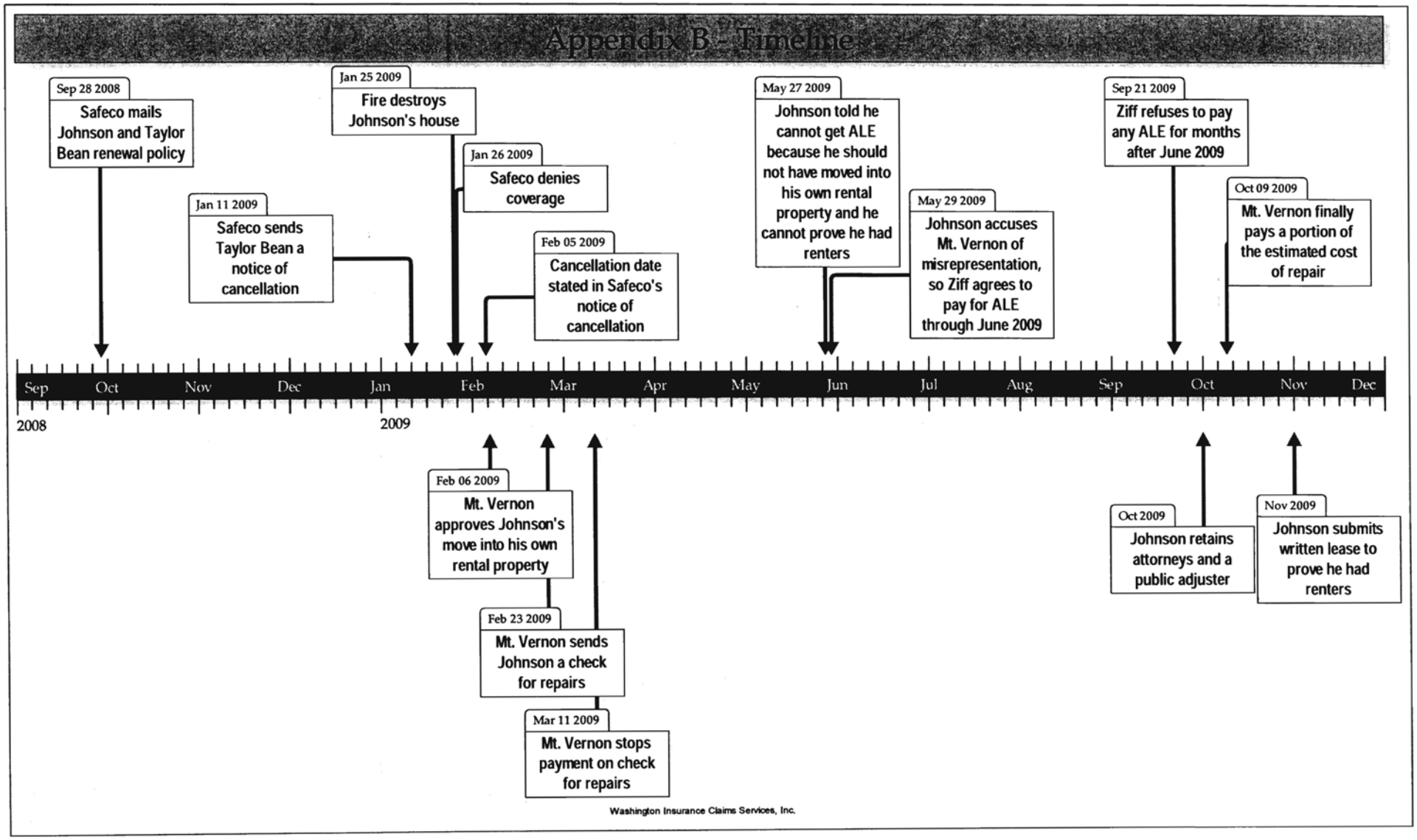
Ki Sin Kim v. Allstate Ins. Co., Inc., 153 Wn. App. 339, 223 P.3d 1180 (2009)	Misrepresentations started immediately No bad faith occurred	Altered medical records and claimed non-existent injuries False statements in wage verification form Lied to Independent Medical Examiner	No bad faith Alleged wrongful commingling of PIP and UIM files – but bad faith claim dismissed	Materiality of misrepresentations was question for jury
Zavala-Vasquez v. Allstate Indem. Co., No. C08-5673BHS, 2009 WL 4824007 (W.D. Wash. Dec. 9, 2009) (order on motion for summary judgment)	Not specified (But arson must have occurred prior to any alleged bad faith)	Inconsistencies in statements during arson investigation	Not specified	Question of fact for jury
Northwestern Mut. Life Ins. Co. v. Koch, No. C08-5394BHS, 2009 WL 3346677 (W.D. Wash. Oct 15, 2009) (order on motion for summary judgment)	Bad faith after lie on application	Lie in disability insurance application	Not specified	Jury question of whether misrepresentation was intentional
Glamuzina v. Glens Falls Ins. Co., No. C07-5011 FDB, 2008 WL 2719564 (W.D. Wash. July 8, 2008) (order on motion for summary judgment)	No bad faith Coverage was denied due to evidence that claim was false	Evidence that insured attempted to sell vehicle after filing a claim for its theft, also evidence of lie about value of vehicle	Insufficient evidence of bad faith	Dismissal of all bad faith claims Misrepresentation issue not ruled upon

Glamuzina v. Glens Falls Ins. Co., No. C07-5011 FDB, 2008 WL 2485572 (W.D. Wash. July 17, 2008) (second order on second motion for summary judgment)	No bad faith – see above	Evidence that insured attempted to sell vehicle after filing a claim for its theft, also evidence of lie about value of vehicle	No bad faith	Jury question on whether misrepresentations occurred and whether they were material
Vargas v. Allstate Ins. Co. C07-5082RBL, 2008 WL 5100304 (W.D. Wash. Nov. 28, 2008) (order denying motion to compel payment)	Delay in payment after lies about contents	Lied about contents inventory Refusal to submit to Examination Under Oath	No bad faith mentioned, but there was a delay in payment	Misrepresentation barred recovery
Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 108 P.3d 1273 (2005)	Not specified	Falsely claimed damage to contents that did not exist	Not specified	Jury found there was a misrepresentation, so insured required to return all claim payments
Allstate Ins. Co. v. Huston, 123 Wn. App. 530, 94 P.3d 358 (2004)	Not discussed (But arson must have occurred prior to any alleged bad faith)	Many misrepresentations during arson investigation concerning circumstances of fire	Not discussed in ruling	Dismissal due to jury verdict finding misrepresentation
Oregon Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 36 P.3d 1065 (2001)	No bad faith	Insured lied during Examination Under Oath after settlement, but jury found insured did not commit arson	No bad faith	Misrepresentation not material because it occurred after settlement of claim

Tornetta v. Allstate Ins. Co., 94 Wn. App. 803, 973 P.2d 8 (1999)	Alleged bad faith after false statement in application	False statement in policy application Other misrepresentations within three months of claim, including exaggerating the cost of items	Alleged unreasonable investigation	Dismissal due to misrepresentation
Wickswat v. Safeco Ins. Co., 78 Wn. App. 958, 904 P.2d 767 (1995)	No bad faith	Exaggerated claim immediately after loss Many misrepresentations made during insurance fraud investigation	No bad faith ("the evidence of Safeco's wrongful conduct is slim at best")	Dismissal due to misrepresentation
Onyon v. Truck Ins. Exchange, 859 F.Supp. 1338 (W.D. Wash. 1994) (order on motion for summary judgment)	Denial of coverage after lie in recorded statement	Lied in recorded statement six days after loss	Wrongful denial of coverage	Misrepresentation barred recovery
Ellis v. William Penn Life Assur. Co. of America, 124 Wn.2d 1, 873 P.2d 1185 (1994)	WAC violation before misrepresentation	Lie in replacement life insurance policy application (same facts as *Strother v. Capitol Bankers*)	Failure to notify insured of hazards of replacement life insurance policy	Despite misrepresentation, insurer barred from asserting misrepresentation defense Distinguished *Cox*, where no insurance regulations were violated

Strother v. Capitol Bankers Life Ins. Co., 68 Wn. App. 224, 842 P.2d 504 (1992), reversed on other grounds by *Ellis v. William Penn*	WAC violation before misrepresentation	Lie in replacement life insurance policy application	Failure to notify insured of hazards of replacement life insurance policy	Despite misrepresentation, CPA action not barred because "the alleged unfair practice in the case at bar preceded, and in fact likely contributed to, any misrepresentations"
Mutual of Enumclaw Ins. Co. v. Cox, 110 Wn.2d 643, 757 P.2d 499 (1988)	No bad faith prior to misrepresentation "We find no merit in Cox's claim that MOE induced his false statements."	Falsified list of contents damaged in fire	Not specified except for alleged failure to assist with contents list (but insurer did refer a professional to assist with contents)	Dismissal due to misrepresentation
St. Paul Mercury Ins. Co. v. Salovich, 41 Wn. App. 652, 705 P.2d 812 (1985)	Denial of coverage after lies and exaggeration	Lied during arson investigation Exaggerated value of contents inventory	Wrongful denial of coverage	Affirmed jury finding of misrepresentation, so coverage voided
Pencil v. Home Ins. Co., 3 Wn. 485, 28 P. 1031 (1892)	No bad faith	Bribed witness who threatened to testify against insured concerning arson, and this bribery violated the void for fraud provision of the policy	No bad faith	Court found that bribery did not void policy because wrongful arson allegation placed insured "under a duress that should excuse him"

Appendix B - Timeline



Washington Insurance Claims Services, Inc.

CERTIFICATE OF SERVICE

I certify that I caused to be served a copy of the forgoing APPELLANT'S OPENING BREIF on the 25th day of May, 2012, to the following counsel of record at the following addresses:

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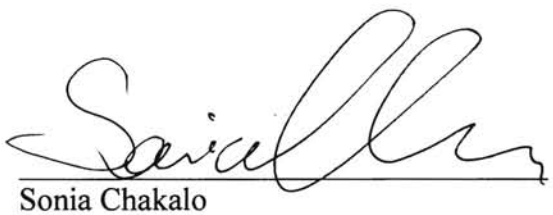

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