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No. 68029-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOEL JOHNSON.

Appellant,

v.

MOUNT VERNON FIRE INSURANCE COMPANY and SAFECO INSURANCE COMPANY OF AMERICA,

Respondents.

REPLY BRIEF OF APPELLANT

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ARGUMENT CONCERNING SAFECO

A. Safeco's Argument Does Not Address the Policy Provision that Required Notice to Taylor Bean Prior to Nonrenewal

Safeco's Brief does not address the fact that the subject insurance policy required that Safeco provide notice to Taylor Bean prior to any non-renewal. The policy provided:

> If 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; *see also* Opening Brief at 6 and 24-25, n. 6.) That provision indicated that the policy would be renewed automatically unless notice was first provided to Taylor Bean, the mortgagee. Such a notice requirement to Taylor Bean makes sense in light of the fact that Taylor Bean, rather than Johnson, had undertaken the responsibility of paying the renewal premium.

Johnson's central argument is that his policy renewed and was effective at the time of the fire because Taylor Bean was never notified of any nonrenewal or cancellation prior to that date. Safeco's refusal to even acknowledge this policy provision is glaring.

B. Three Separate Policy Provisions Each Independently Required Notice Prior to Any Non-Renewal

In addition to the above-quoted notice provision for the mortgagee, two other provisions required notice prior to any non-renewal of the subject

policy. The second policy provision provided:

> Non-Renewal. We may elect not to renew this policy. We may do so by delivering to you, or mailing to you at your mailing address shown in the Declarations, written notice at least 31 days before the expiration date of this policy. Proof of mailing shall be sufficient proof of notice.

(CP 52 at ¶ 5.) This policy provision established that the policy would renew *automatically* unless notice was sent 31 days prior to the expiration date of the policy.[1]

A third provision of Johnson's policy with Safeco also required that Johnson be notified prior to any cancellation. The policy provided:

> When you have not paid the premium we may cancel at any time by notifying you at least 20 days before the date of cancellation takes effect.

(CP 52 at ¶ 4.b.(1)). As discussed below, Washington has interpreted this precise language such that "cancellation" includes non-renewals. *See discussion of Whistman v. West American of Ohio Cas. Group of Ins. Companies*, 38 Wn. App. 580, 686 P.2d 1086 (1984), *infra*. Any notice of "cancellation" must also be sent to the mortgagee. RCW 48.18.290 (1)(e). Accordingly, this third provision further established the requirement that both Johnson and Taylor Bean be notified prior to non-renewal due to

[1] This provision directly contradicts Safeco's broad assertion that, "[s]imply put, an insurance policy does not renew unless a renewal premium is actually paid." (Safeco Brief at 8.)

nonpayment.

The facts are as follows: Johnson's policy was set to expire on November 17, 2008. (*See* CP 48.) If Safeco intended to non-renew the policy, it was required to send Johnson "written notice at least 31 days before the expiration date of this policy." (CP 52 at ¶ 5.) But it did not do so. On September 28, 2008, Safeco mailed Johnson the renewal policy that would become effective on November 17, 2008. (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 a batch payment for the policy premium on behalf of Johnson, but the payment was later stopped. (CP 113, 116.) Safeco did not notify Taylor Bean of the payment error or request another check. (*See* CP 41-43.) Nor did Safeco notify Taylor Bean that the policy would not be renewed. (*See id.*) Instead, Safeco sent Johnson a letter notifying him that it had not received payment from him and that his policy had expired on November 17, 2008 and his coverage would be terminated if he did not send payment by January 5, 2009. (CP 54.) Johnson never saw that letter. (CP 118 at ¶ 5.) And no such letter was sent to Taylor Bean. (*See* CP 41-43.) On January 11, 2009, Safeco finally sent Taylor Bean a "Notice of Cancellation." (CP 58.) This was the <u>first time</u> that Taylor Bean was ever notified of the possibility of non-renewal or cancellation. (*See* CP 41-43.) 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.)

The above facts show that Safeco did not comply with the policy provision requiring it to notify Taylor Bean prior to any non-renewal. Nor did Safeco give Johnson 31-days-notice prior the November 17, 2008 expiration date that his policy would not be renewed. Accordingly, the policy renewed and remained effective until February 5, 2009.

Safeco argues that the policy was not renewed and that Safeco was not required to notify Taylor Bean prior to non-renewing the policy. Safeco relies on the policy provision that states:

> This policy may be renewed for successive policy periods if the required premium is paid and accepted by us on or before the expiration of the current policy period.

(Safeco Brief at 3, citing CP 51-52.) Safeco argues that this provision established that "Johnson would not be covered if he failed to pay the renewal premium when due." (Safeco Brief at 3.) If Safeco's interpretation of this provision is correct, and it allowed Safeco to not renew the policy *without* providing notice to Taylor Bean and Johnson, then that policy provision ***conflicts*** with each of the three policy provisions cited above that required notice prior to non-renewal.

C. Conflicting Policy Provisions Must Be Construed In Favor of Johnson

Because three of the provisions in Johnson's policy with Safeco require notice to Johnson and Taylor Bean prior to non-renewal, and because Safeco argues that another provision allowed non-renewal even when no notice was sent, there is a conflict in the policy language. In Washington, conflicting policy language must be resolved in favor of the insured.

Insurance policies are "contracts of adhesion." *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 323, 88 P.3d 395 (2004). Accordingly, courts look at them in a light most favorable to the insured. *Id.* When a policy term is capable of two constructions, it must be construed in favor of the insured. *Shotwell v. Transamerica Title Ins. Co.*, 91 Wn.2d 161, 167, 588 P.2d 208 (1978). Where a policy is ambiguous on an issue, that ambiguity must be construed in favor of the insured. *Panorama Vill. Condo. Owners Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 137, 26 P.3d 910 (2001). The subject policy explicitly required that a notice be sent to Taylor Bean 20 days prior to any non-renewal. The policy also required that notice of non-renewal be sent to Johnson 31 days prior to the November 17, 2008 expiration date of the policy. Those requirements benefitted Johnson and they could not be overcome by conflicting policy language. Accordingly, Johnson's policy was effective until Safeco sent Taylor Bean a notice of nonrenewal or cancellation. Because Safeco's notice to Taylor Bean did not cancel the

policy until February 5, 2009, the policy was effective on the day of the fire, January 25, 2009.

D. Johnson's Case Is Distinguishable from Safeco v. Irish *and Is More Like* Whistman v. West American

Safeco relies on *Safeco v. Irish*, 37 Wn. App. 554, 681 P.2d 1294 (1984) to support its argument that the policy automatically terminated and did not renew. But the *Irish* opinion was decided based on completely different policy language. In *Irish*, the subject insurance policy contained a provision that stated:

> AUTOMATIC TERMINATION. If we offer to renew and you or your representative do not accept, this policy will automatically terminate at the end of the current policy period. Failure to pay the required renewal premium when due shall mean that you have not accepted our offer.

Irish, 37 Wn. App. at 556. Johnson's policy with Safeco did not contain any such "automatic termination" provision. Instead, Johnson's policy assumed automatic renewal and provided that, if Safeco wanted to prevent automatic renewal, Safeco needed to send "written notice at least 31 days before the expiration date of this policy." Further, the policy provided that if "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."

The *Irish* decision was based on the "clear and unambiguous terms of the policy." 37 Wn. App. at 560. Here, the clear and unambiguous terms of the

policy required that Johnson and Taylor Bean be notified prior to any non-renewal.

The facts in Johnson's case are similar to *Whistman v. West American of Ohio Cas. Group of Ins. Companies*, 38 Wn. App. 580, 686 P.2d 1086 (1984), which also involved the failure to pay a renewal premium. The decision distinguished *Irish* and found that the insurer was required to provide notice of cancellation prior to the non-renewal of the policy. 38 Wn. App. at 584. In *Whistman*, a homeowner died and the executor of his estate failed to timely pay the renewal premium; but the appellate court found that the policy was not terminated because no notice was given by the insurer. 38 Wn. App. at 583-84. The appellate court found that *Whistman* was distinguishable from *Irish* because the subject policy did not contain the "automatic termination" provision that was part of the *Irish* policy. 38 Wn. App. at 583, n.1.

The *Whistman* decision relied on language that is almost identical to language contained in Johnson's policy. The decision explained:

> [T]he policy states: "*When you have not paid the premium . . . we may cancel at any time by notifying you at least 10 days before the date cancellation takes effect.*" The reference to "premium" is not limited to premiums paid during the term of the insurance and reasonably could be read as including premiums due in order to effect renewal. It is a well-settled rule of construction that ambiguities in insurance policies are resolved in favor of the interpretation which provides coverage. Accordingly, we construe the policy language here as requiring [the insurer] to give 10 days notice prior to cancellation for failure to pay a renewal premium. Since [the

insurer's] notice of cancellation was not effective prior to the date of the fire loss, that loss is covered by the policy.

38 Wn. App. at 583-84 (citations omitted) (emphasis added). Thus, the appellate court found that "cancellation" included non-renewal. As quoted above, Johnson's policy with Safeco contained a nearly identical cancellation provision.[2] Under *Whistman*, Safeco's policy language should be interpreted to require a notice prior to the cancellation/non-renewal of the policy.

Despite Respondent Safeco's contention, Safeco's policy with Johnson did not terminate automatically. This is because the policy did not contain an automatic termination clause like that in *Irish*. Instead, it contained three different provisions that each independently required notice prior to non-renewal. One of those provisions contained identical language to the provision relied upon in the *Whistman* decision. In short, the policy provisions at issue in this case were like those in *Whistman* and unlike those in *Irish*. Because Safeco failed to timely notify Taylor Bean of any cancellation and/or nonrenewal prior to the fire, the subject policy was not terminated and the loss was covered.

[2] "When you have not paid the premium we may cancel at any time by notifying you at least 20 days before the date of cancellation takes effect." (CP 52 at ¶ 4.b.(1).)

E. Frye, Webster and McGreevy Are Applicable to This Case

Safeco argues that the Court should not apply the Washington cases which hold that a policy becomes effective on the date it is issued and delivered.[3] But Safeco has not cited any cases that contradict *Frye* and its progeny.

Safeco relies exclusively on *Irish* for its argument that insurance policies should automatically terminate even if a renewal policy is issued and delivered to the insured. But the *Irish* decision did <u>not</u> contain a broad proclamation that all policies automatically terminate if the premium is not paid. The *Irish* decision simply interpreted the policy language. The *Whistman* decision confirmed that the policy language controls and that a policy may renew automatically if it does not contain the automatic termination clause that existed in *Irish*. Neither *Whistman* nor *Irish* cite *Frye*, but those decisions do not conflict with the *Frye* presumption that a policy becomes effective when it is issued and delivered to the insured. There is no reason to think that *Frye* does not also apply to the renewal policy Safeco sent to Johnson.

However, it is probably unnecessary for the Court to determine

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[3] Those cases are *Frye v. Prudential Insurance Co.*, 157 Wn. 88, 288 P. 262 (1930); *Webster v. State Farm Mut. Auto. Ins. Co.*, 54 Wn. App. 492, 496, 774 P.2d 50 (1989) and *McGreevy v. Or. Mut. Ins. Co.*, 74 Wn. App. 858, 866-67, 876 P.2d 463 (1994).

whether *Frye* applies to this matter because, as discussed above, the renewal question can be resolved based on *Whistman* and the three policy provisions that required notice prior to non-renewal.

F. Taylor Bean's Payment to Safeco Was Not a 'Counter Offer'

Safeco attempts to characterize the payment check sent by Taylor Bean as a "counter offer." But that characterization assumes the absurd: that Johnson "made an offer to accept the policy without actually paying the premium." No reasonable person would interpret the act of stopping a check as a counter offer. A check is a promise to pay the full amount written on the check. Accordingly, a check is sufficient to communicate acceptance of an offer. Taylor Bean subsequently interfered with the transfer of funds, but that did not transform Johnson's acceptance into a counter offer.

However, it is probably unnecessary for the Court to decide whether Taylor Bean's payment check served as acceptance of an offer to renew the policy. This is because, as discussed above, the renewal question can be resolved based on *Whistman* and the three policy provisions that required notice prior to non-renewal.

G. *Safeco Agrees That, If It Wrongfully Denied Coverage, Johnson's Extra-Contractual Claims Should Not Have Been Dismissed*

Both Appellant Johnson and Respondent Safeco agree that Johnson's extra-contractual claims turn on whether Safeco properly denied coverage to Johnson. If the Court finds that an issue of fact exists concerning whether Safeco was required to give notice of nonrenewal and/or cancellation to Taylor Bean prior to the fire, then issues of fact also exist concerning whether Johnson was covered and whether he had standing to assert extra-contractual claims. Safeco does not oppose this argument.

CONCLUSION CONCERNING SAFECO

Safeco was required to send notice of non-renewal to Taylor Bean prior to any non-renewal of the policy. It did not do so. As such, the policy was in effect and Safeco was required to provide timely notice of cancellation to both Johnson and Taylor Bean. Because Safeco failed to do so, the policy was effective at the time of the fire and it should not have denied coverage. As such, genuine issues of fact exist and the Court should reverse the summary judgment dismissal of Johnson's claims for breach of contract, bad faith, the Consumer Protection Act (CPA), and the Insurance Fair Conduct Act.

ARGUMENT CONCERNING MOUNT VERNON

A. Johnson' Litigation Conduct Is Irrelevant

Mount Vernon's Brief places great emphasis on Johnson's litigation conduct and his failure to admit to his misrepresentation. This appears to be an attempt to argue that Johnson's claims should have been dismissed as a litigation sanction. But there is no legal authority for such an argument. Johnson's claims were dismissed based on *Cox*, which applies to misrepresentations made during an insurance claim. *Cox* does not apply to litigation conduct and no court has ever interpreted it to include litigation conduct.

Johnson was already sanctioned $22,500 for refusing to admit to his misrepresentation during litigation. Johnson has not assigned any error to that sanction, so his litigation conduct and the corresponding sanction are not at issue in this appeal.

B. Mount Vernon Does Not Dispute the Accuracy of Johnson's Survey of Cases Applying **Cox**

Johnson's Opening Brief included a survey of every Washington case involving a misrepresentation by an insured during an insurance claim. That survey shows that no decision has ever found that *Cox* applies retroactively and bars a remedy for bad faith and CPA violations that precede a misrepresentation. Mount Vernon does not challenge the

accuracy of that survey; nor does it challenge Johnson's analysis of those cases. Instead, Mount Vernon argues that the facts in *Cox* show that the *Cox* decision retroactively barred claims for alleged bad faith and a CPA violation that occurred prior to the misrepresentation.

Therefore, aside from Mount Vernon's interpretation of the *Cox* case itself, it is undisputed that no court has ever applied *Cox* to bar claims for bad faith and CPA violations that preceded a misrepresentation.

C. The Washington Supreme Court Disagrees with Mount Vernon's Interpretation of the Facts in the **Cox** *Case*

Mount Vernon argues that the "*Cox* court itself held . . . that the insured could not maintain bad faith or CPA claims when he had intentionally misrepresented facts during the course of the claim even where the insured alleged bad faith conduct which preceded the misrepresentation." (Mount Vernon Brief at 41) (emphasis omitted.) But the *Cox* opinion did not contain such facts. The Washington Supreme Court explicitly stated that it found *no merit* in Cox's allegations that any bad faith conduct occurred prior to his misrepresentation. *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 650, 757 P.2d 499 (1988). Cox alleged that his insurer violated the insurance regulations by failing to assist him with filling-out his inventory of damaged property, thereby inducing his misrepresentation. *Id.* But the Court explained that the insurer

had actually *recommended a professional to Cox for the very purpose of assisting him with his inventory. Id.* This fact completely undermined Cox's contention that the insurer violated the CPA prior to his misrepresentation. Accordingly, the Court stated that "[w]e find no merit in Cox's claim that MOE induced his false statements." *Id.* While Cox did attempt to argue that his insurer violated the CPA prior to his misrepresentation, the Washington Supreme Court found that his allegation lacked any merit.

Subsequent decisions have confirmed that Mount Vernon's interpretation of *Cox* is incorrect. In addition to the explicit statements in *Cox*, the Washington Supreme Court later confirmed that the insurer's alleged actions in *Cox* did not violate the insurance regulations at all. *Ellis v. William Penn Life Assur. Co. of Am.*, 124 Wn. 2d 1, 14, 873 P.2d 1185 (1994). The *Ellis* decision stated:

> 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.

Ellis, 124 Wn. 2d at 14.

The *Strother* decision also agreed that "the fraud in *Mutual of Enumclaw* [*v. Cox*] preceded any bad faith handling of the claim." *Strother v. Capitol Bankers Life Insurance Co.*, 68 Wn. App. 224, at 241,

842 P.2d 504 (1992), reversed on other grounds by *Ellis*, 124 Wn. 2d 1 (reviewing *Strother sub nom.*).[4] Mount Vernon is asking this Court to interpret the facts in *Cox* in a way that contradicts the ruling in *Cox* and also contradicts subsequent statements by courts interpreting *Cox*.

D. Mount Vernon Offers No Justification for Its Wrongful Conduct

Johnson's Opening Brief presents overwhelming and undisputed evidence that Mount Vernon unreasonably delayed payment to Johnson for the damage to his structure, wrongfully stopped payment on a check it sent him, misled him concerning whether he should live in his rental house, and refused to pay him additional living expenses (ALE) after acknowledging it misled him. These actions violated numerous insurance regulations and placed Mount Vernon's interests above Johnson's, making Mount Vernon liable for bad faith and violation of the CPA.

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[4] Mount Vernon argues that the statements made in *Ellis* and *Strother* should be disregarded because a later decision, *Wickswat v. Safeco Ins. Co.*, 78 Wn. App. 958, 904 P.2d 767 (1995), interpreted those rulings to apply exclusively to life insurance policies. But the statements in *Ellis* and *Strother* explicitly interpreted *Cox*. And *Wickswat* did not address the issue raised by Johnson's case because *Wickswat* did not involve a meritorious claim of bad faith. The court in *Wickswat* explained that "the evidence of Safeco's wrongful conduct is slim at best." *Id.* at 975, n.6. And there was no allegation that the bad faith had preceded the misrepresentation in *Wickswat*.

Mount Vernon does not dispute Johnson's allegation that it waited nine months to honor its first, insufficient, payment for his house repairs. Nor does Mount Vernon dispute that it waited a total of two years to finally pay him the full amount it owed for the structure. Nor does Mount Vernon dispute that Johnson was misled concerning his ALE and whether he should have moved into his rental house. Mount Vernon makes almost no effort to dispute or justify its breach of the duty of good faith or its violations of the WAC insurance regulations. For example, Mount Vernon states that it stopped payment on Johnson's structure check because Mount Vernon incorrectly hoped that it might "have no obligation to pay given the Safeco policy." (Mount Vernon Brief at 8.) This admission confirms Mount Vernon's self-interested motive, but it is not a legal justification for placing its interests above Johnson's and delaying that payment for nine months.

Mount Vernon argues that the Court should not consider Mount Vernon's wrongful conduct because Johnson has admitted his misrepresentation and Mount Vernon has not admitted to acting in bad faith and violating the insurance regulations. But under the standard of review for a CR 50 motion for judgment as a matter of law, all of Johnson's allegations must be assumed to be true. Moreover, Johnson's "allegations" are based almost entirely on the statements contained in

Mount Vernon's own file notes and the deposition transcripts of Mount Vernon's agents. Mount Vernon has offered no evidence to rebut those allegations.

E. Mount Vernon's Attempts to Shift Blame Are Not Compelling and Conflict with the Record

Though Mount Vernon does not contradict Johnson's allegations, its Brief does attempt to shift blame for some of Mount Vernon's wrongful conduct. Many of Mount Vernon's blame-shifting assertions are not supported by the record and have no citation.

1. Johnson Contacted Multiple Contractors

Mount Vernon emphasizes that Johnson "failed" to choose a contractor to do the repairs. But Brown's file notes confirm that, immediately after the fire in February of 2009, Johnson contacted multiple contractors. (*See* CP 1455-56.) The record indicates that Johnson contacted Wayne Dows at Emerald City Contracting, Erin Glen at Dawes Construction, Aaron at Done Right Construction and Bill Davis. (*See id.*) All of those contractors then telephoned Brown to try to work with him on the repairs. (*Id.*) The contractors that inspected the damage told Johnson that the repairs would cost approximately $200,000, instead of the $133,041 estimated by Brown. (CP 1990-91, ¶ 12.) Brown's notes show that at least one of those contractors told

him that they could not bid on the job because it was "too big." (CP 1455.)

There is no evidence that any contractor was willing and able to do the repairs for the impossibly-low amount estimated by Brown. Regardless, Johnson did not need to choose a contractor until *after* Mount Vernon actually provided him with money for the repairs.

2. Mount Vernon Cannot Blame Johnson for the Delay of His Personal Property Inventory

Mount Vernon asserts that it prematurely closed its claim because Johnson had not yet submitted a personal property inventory. (Mount Vernon Brief at 10.) But Brown admitted that Johnson's difficulty in generating that inventory should not have had any impact on the ALE and structure portions of his claim. (CP 360 at lines 22-25; CP 361.)

Further, Mount Vernon failed to assist Johnson with his inventory and failed to investigate the inventory damage. It was Mount Vernon's responsibility, not Johnson's, to estimate the damage to his personal property.[5] Brown never offered Johnson any assistance with his personal property inventory, which included more than one-thousand items. (*See* CP

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[5] "The insurer evaluates the claim, determines coverage, and assesses the monetary value of the coverage." *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 282-83, 961 P.2d 933 (1998). To the extent that Mount Vernon needed Johnson's cooperation in preparing an inventory of the damage, Mount Vernon was required to provide him with forms, instructions and reasonable assistance. WAC 284-30-360(4).

1991-92 at ¶ 17.) Instead, Brown instructed Johnson to research the price and determine the age of every damaged item. (CP 354, 359-60.) Even after Johnson hired a professional for assistance and provided Mount Vernon with a professionally-prepared inventory of the damage, Brown waited seven months just to verify that inventory valuation. (CP 368-70.)

3. Mount Vernon Never Told Johnson to Leave His Rental Property

Mount Vernon argues that Johnson should have moved out of his rental property after learning that Mount Vernon had misled him. (Mount Vernon Brief at 9.) But there is no evidence that Johnson was ever told he should have moved out of the rental property. Instead, Mount Vernon's file notes show that Ziff agreed to pay some ALE money to Johnson and indicated that "we will owe more." (CP 329 at ¶ 5.)

4. Mount Vernon's Delays Cannot Be Blamed on the Bankruptcy of Taylor Bean

Mount Vernon also blames its delay of payment on a notice of bankruptcy it received from Taylor Bean. (Mount Vernon Brief at 12.) But Mount Vernon did not receive that notice until June 30, 2010, which was a year-and-a-half after the fire. (*Id.*) Mount Vernon's file notes show it did not consider the bankruptcy issue until October 13, 2010. (CP 346 at ¶ 3.) Johnson is seeking a remedy for the bad faith and CPA violations that occurred prior to his misrepresentation. The subsequent notice of bankruptcy

has little relevance.

F. Johnson's Dire Financial Situation Does Not Help Mount Vernon's Argument

Mount Vernon's Brief also emphasizes Johnson's poor financial situation at the time of the fire. It is unclear how this fact supports Mount Vernon's argument. It is true that Johnson was in a declining financial situation at the time of the fire. It is true that Johnson's financial situation became increasingly dire because Mount Vernon refused to pay what it owed. And it is true that Johnson's desperate financial situation led to his rash attempt to use a misrepresentation to persuade Mount Vernon to pay what it owed.

The parties agree that Johnson was desperate. The overwhelming evidence shows that Mount Vernon's bad faith and CPA violations contributed to Johnson's financial and emotional desperation.

CONCLUSION CONCERNING MOUNT VERNON

Mount Vernon has not offered a justification for its actions. Mount Vernon has not offered any public policy reasons why *Cox* should be expanded to bar all remedies for bad faith that precedes and contributes to an insured's misrepresentation. Instead, Mount Vernon strains the facts in *Cox* to argue that the *Cox* decision itself barred claims for conduct that preceded a misrepresentation. But that interpretation of the facts in *Cox*

contradicts statements by the Washington Supreme Court in the *Cox* decision and also contradicts the subsequent decisions that interpreted *Cox*.

The trial court's CR 50 dismissal of Johnson's bad faith and CPA claims against Mount Vernon should be reversed and Johnson should be allowed to seek recovery for bad faith and CPA violations that occurred prior to his misrepresentation.

RESPECTFULLY SUBMITTED this 27th day of August 2012.

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CERTIFICATE OF SERVICE

I certify that I caused to be served a copy of the forgoing APPELLANT'S REPLY BREIF on the 27th day of August, 2012, to the following counsel of record at the following addresses:

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