68029-3

68029-3

NO. 68029-3 I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

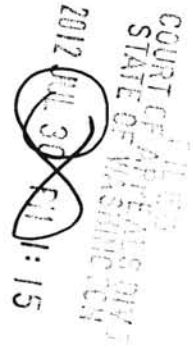
JOEL JOHNSON,

Appellant,

vs.

SAFECO INSURANCE and MOUNT VERNON FIRE INSURANCE COMPANY,

Respondents.



MOUNT VERNON FIRE INSURANCE COMPANY BRIEF

Joseph D. Hampton, WSBA #15297
Jeffrey S. Tindal, WSBA #29286
Betts, Patterson & Mines, P.S.
Attorneys for Respondent Mount Vernon Fire Insurance Company
One Convention Place, Suite 1400
701 Pike Street
Seattle, WA 98101-3927
(206) 292-9988

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

FEDERAL CASES

TABLE OF AUTHORITIES

Page

WASHINGTON STATUTES

WASHINGTON RULES AND REGULATIONS

I. INTRODUCTION

Appellant Joel Johnson ("Johnson") is an admitted liar, forger and counterfeiter who, in this appeal, asks the Court to allow him to maintain his bad faith and Consumer Protection Act ("CPA") claims despite being caught during litigation committing insurance fraud. Johnson has admitted to fabricating and forging a written lease containing several false terms during the adjustment of his claim, in order to obtain additional living expense ("ALE") proceeds from his insurer, Respondent Mt. Vernon Fire Insurance Company ("Mt. Vernon") that was not payable under the policy. After forging the lease, Johnson concealed his fraud during the course of the litigation and lied under oath at his deposition before Mt. Vernon discovered the fake lease just before trial.

The face of the forged and fraudulent lease purported to lease real property at an unknown location to "Pete, Evon Little" for $1,800 per month for the term May 15, 2008 to November 1, 2008. The lease was allegedly signed by Mr. and Mrs. Little on May 15, 2008. All of these facts and terms were confirmed by Johnson in his deposition, which took place on August 31, 2011. However, following Johnson's deposition, Mt. Vernon discovered that the lease could not have been signed by anyone on May 15, 2008 because page two of the alleged lease was a form

that was not published by the company who created it until sometime in 2009.

Following being confronted with evidence that the lease was bogus, Johnson changed his story. He admitted there was no written lease between himself and the Littles, but maintained that he created the lease to substantiate his ALE claim and that the terms on the bogus written lease accurately represented an oral lease he had with the Littles. Interestingly, just a week before trial Johnson notified Mt. Vernon of "new" evidence, which contained the true names of his renters, Dean Little and Yvonne Calizar.

With the real names of the renters, Mt. Vernon located them within days. Mr. Little's testimony confirmed Johnson had lied about the important terms of the lease, including the monthly rent, the space actually rented and the dates of occupancy. Johnson did not attempt to rebut Mr. Little's testimony in any way and instead argued to the court that he should be allowed to continue prosecuting his extra-contractual claims against Mt. Vernon despite his fraudulent conduct. Based on Johnson's insurance fraud, the trial court dismissed Johnson's sole remaining contractual claim for ALE and his bad faith and CPA claims pursuant to Mt. Vernon's Motion for Judgment as a Matter of Law on the morning of trial.

Johnson's sole argument in this appeal is that he should be allowed to go to trial on his bad faith and CPA claims because his *admitted* fraud came after Mt. Vernon's *alleged* bad faith conduct. Johnson bases his argument on a clear misreading of *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988), and other cases. However, the insured in *Cox*, just like Johnson here, alleged that his insurer had acted in bad faith prior to his fraud, so it is unclear how *Cox* supports Johnson's argument. Moreover, the public policy considerations in *Cox* are clearly present here – that an insured's intentional conduct of defrauding an insurance company trumps allegations of negligent claim handling or other bad faith conduct. *Cox* clearly applies in this instance and the Court should affirm the trial court's ruling that Johnson cannot maintain his bad faith and CPA claims in light of his admitted fraud.

II. STATEMENT OF ISSUE

Did the Court err in dismissing Johnson's CPA and bad faith claims pursuant to CR 50 when Johnson admittedly forged a written lease containing false terms and submitted it to his insurer in order to obtain additional insurance proceeds that he would have otherwise not been entitled to?

No. The Court followed well-established precedent and public policy and properly dismissed Johnson's extra-contractual claims due to his admitted fraud.

III. STATEMENT OF THE CASE

A. Background Facts

The story of Johnson's fraudulent insurance claim is set in two key locations: his residence at 5703 - 145th Street S.W. in Edmonds, Washington where the fire took place (the "Subject Property") and his rental property located at 9036-38 4th Avenue S.W. in Seattle, Washington (the "Rental Property").

Johnson bought the Subject Property in 1983 or 1984 for about $65,000. CP 486 (page 21). The Subject Property was Johnson's primary residence. CP 483. In 1995, Johnson opened his own business, known as "Goodfellows Decorating Service ("Goodfellows")," which was a sole proprietorship. CP 483-84. The Rental Property is a duplex, consisting of an approximate 2,500-2,600 square foot upstairs and a small basement apartment of approximately 1,000 square feet. CP 489-90. Johnson obtained a half interest in the Rental Property upon his mother's death in 2007. CP 486.

In May 2008, Johnson bought out his brother's interest in the Rental Property, taking out a loan to accomplish this. CP 487. At that

time, Johnson was making monthly mortgage payments on the Subject Property totaling approximately $1,500 and on the Rental Property totaling approximately $1,800. CP 502; CP 504. In addition, he was paying $770 per month in rent on the warehouse space for Goodfellows. CP 491.

Johnson had been having financial difficulties for years prior to the fire. Even before the onset of the recent recession, he was struggling. In 2005, Johnson had an adjusted gross income of $13,233. CP 513. In 2006, Johnson's adjusted gross income was $10,231. CP 523. In 2007, Johnson's adjusted gross income was $1,059. CP 534.

At its height in January 2007, Johnson's "rollover" individual retirement account was over $100,000. CP 543. In January 2008, Johnson began prematurely withdrawing money from his retirement account in January 2008. CP 640-49. As of January 31, 2009 – just five days after the fire, it was under $35,000. CP 554-62.

Meanwhile, Johnson was falling further behind financially. He received electricity disconnection notices for the Subject Property in May 2008 and September 2008, and his service was ultimately disconnected for non-payment in October 2008. CP 554-62. He was constantly being threatened with having the water to the Subject Property shut off. CP 656-66. Johnson was unable to make a single payment on the

electricity bill or the utilities bill at the Rental Property from September 2008 until February 2009. CP 738-745; CP 747-754. Finally, in the year 2008, Johnson had one overdraft charge for his personal account and nine overdraft charges for his business account. CP 733-36. Simply put, Johnson was in dire financial straits prior to the fire and his now-admitted insurance fraud.

B. Pertinent Claim Handling Facts

On January 24, 2009, a fire occurred at the Subject Property. At the time, Johnson thought he was insured with Safeco. However, Johnson's mortgage lender had previously taken out a lender's forced place policy through Mt. Vernon.[1] CP 3. The Mt. Vernon insurance policy was effective from February 1, 2008, to February 1, 2009 and was numbered F218195 (the "Policy"). Following the fire, Johnson submitted a claim to Mt. Vernon and assigned claim representative Maureen Connor ("Connor") to adjust the claim. CP 773. To assist it with the local adjustment, Mt. Vernon retained independent adjuster, Tony Brown ("Brown"). CP 298-99.

---

[1] A force placed insurance policy is typically taken out by a lender in its name when a borrower fails to provide proof of insurance or fails to pay his premium in order to insure the real property that secures the loan made by the lender to the borrower.

Initially, Brown inspected the Subject Property on February 6, 2009 and completed an estimate to repair the damaged structure for $131,125 thereafter. CP 323. Based on this estimate, Mt. Vernon issued a check to Johnson and his mortgage lender. *Id.* Brown also informed Johnson of the Policy's ALE coverage. CP 64.

The Subject Property was approximately 1,500 square feet and contained three bedrooms and one and three quarter bathrooms. CP 489. Johnson informed Brown that he had moved into his unoccupied rental home located at 9036 - 4th Avenue S.W. in Seattle (the "Rental Property") in order to mitigate the loss. CP 323. The Rental Property is a duplex consisting of a 2,500-2,600 square foot main dwelling (with three bedrooms and one and a half bathrooms) and a mother-in-law apartment of approximately 1,000 square feet (with one bedroom and one bathroom). CP 489. Johnson testified that during his occupancy of the Rental Property, the mother-in-law apartment was unoccupied, a statement we now know to be a lie. CP 490. In order for it to assess ALE coverage, Mt. Vernon requested that Johnson provide documentation in support of such a claim. CP 774.

In early March, Mt. Vernon became aware that the Safeco policy was in existence at the time of the loss and may be primary given the force placed nature of the Policy. CP 324. As a result, Mt. Vernon stopped

payment on the previously-issued check because it may have had no obligation to pay given the Safeco policy. CP 324.

In March 2009, Mt. Vernon instructed Johnson to choose a contractor to do the repairs, but Johnson failed to do so. CP 324; CP 777. In May 2009, Mt. Vernon agreed it would be responsible for 49% of the cost to repair the Subject Property and Safeco agreed to be responsible for 51% of that cost. CP 326.

In May 2009, Mt. Vernon noted several discrepancies between its estimate of repair and Safeco's estimate of repair. CP 327. Mt. Vernon and Safeco agreed to work with each other to resolve the discrepancies in the estimate to repair the structure. At this time, Johnson still had not chosen a contractor to perform the repairs. CP 327.

Additionally in May 2009, Johnson submitted a letter he prepared detailing his ALE claim. CP 780. This letter stated that he was seeking, among other things, $1,800 for alternative housing. *Id.*

Following receipt of the letter, Connor spoke with Johnson about ALE on May 26, 2009. CP 774. At that time, Connor explained that she needed actual substantive documentation to support the claim. *Id.* Connor then spoke with her supervisor, James Ziff ("Ziff"), about Johnson's ALE claim and they determined that given the policy language, there was no coverage for the alleged $1,800 in past rent because Johnson (1) had not

suffered an increase in living expenses as required by the Policy; (2) did not have tenants willing and able to rent the Rental Property; and (3) had not produced any substantive documentation to support the claim. *Id.*

After he was informed of Mt. Vernon's decision concerning his ALE claim, Johnson spoke with Connor on May 27, 2009, stating he felt he had been misled by Brown and he would not have stayed in the Rental Property had he known there was no coverage. *Id.* Connor stated she would have Ziff contact him about the ALE claim. *Id.*

On May 29, 2009, Ziff spoke with Johnson. CP 823. Despite the fact that Mt. Vernon did not see any ALE coverage, as a matter of good faith and fair dealing Ziff allowed Johnson five months at $1,250 per month for a total of $6,250 in order to allow for any potential confusion arising out of Brown's and Johnson's prior conversations concerning ALE coverage. CP 823-24. Despite the fact that Johnson was aware that he had no ALE coverage, he continued to live in the Rental Property.

In June 2009, Johnson went silent and stopped responding to Mt. Vernon's communications. CP 330. Johnson resurfaced on August 5, 2009, when he called Brown about obtaining additional ALE money. CP 824. At this time, Johnson had still not (1) provided any documentation supporting his ALE claim, (2) chosen a contractor, or (3) submitted his inventory of destroyed personal property. *Id.*; CP 775.

On September 17, 2009, Mt. Vernon learned that Safeco had paid the actual cash value ("ACV") of its portion of the structure damage on June 20, 2009. CP 331. After learning of Safeco's payment, Mt. Vernon issued a payment to Johnson and his mortgage lender in the amount of $64,311.27, based on its estimate and the pro rata sharing agreement previously reached with Safeco. *Id.*

On September 21, 2009, Ziff spoke with Johnson and informed him that he had thirty days to provide documentation in support of his ALE claim or it would be closed. CP 824.

In the meantime, Johnson did not provide any further documentation in support of his ALE claim, did not choose a contractor to perform the structure repairs and did not submit his personal property inventory; thus, consistent with Ziff's prior warning, Mt. Vernon closed the claim on October 19, 2009. CP 774-75.

Mt. Vernon next heard from Johnson on November 25, 2009, when it received a facsimile letter from Johnson's newly-retained legal counsel demanding $18,000 in ALE money. CP 775. Contained with this letter was a document purporting to be a lease for the Rental Property, the first time Johnson had submitted anything substantive in support of his ALE claim. CP 814-15. The lease was submitted with the intent that it was

proof of Johnson's rental income in order to justify the demand of ten months of ALE at $1,800 per month. *Id.*; CP 775.

On December 1, 2009, Mt. Vernon responded once again indicating that lost rental income was not covered under the ALE portion of the Policy given the fact that the Rental Property was unoccupied at the time of the loss and Johnson had not shown that he had actually foregone any rental income by residing in the Rental Property. CP 817-19.

On December 30, 2009, Johnson's counsel sent a Proof of Loss to Mt. Vernon for the structure claim along with an estimate of repair for $210,729.84. CP 398-99. On January 4, 2010, Mt. Vernon received a 20 day Insurance Fair Conduct Act ("IFCA") notice dated December 18, 2009 from Johnson's counsel demanding $7,500 in additional ALE money. CP 821-22.

On January 5, 2010, Mt. Vernon reopened Johnson's claim. CP 334. On January 7, 2010, Mt. Vernon formally rejected the Proof of Loss because Johnson's estimate of repair was substantially more than Mt. Vernon's and informed Johnson that it was instructing its adjuster to re-inspect the property and attempt to agree with Safeco's adjuster on an agreed cost of repair. CP 395-96. Mt. Vernon also indicated that it would agree to pay an additional $7,500 on Johnson's ALE claim, which it did. CP 334; CP 824.

On February 22, 2010, Johnson finally provided his inventory of personal property damaged or destroyed in the fire. CP 775. Mt. Vernon subsequently paid the remaining $75,683.36.

Mt. Vernon heard nothing further from Johnson regarding his ALE claim until June 18, 2010, when it was served with Johnson's lawsuit. CP 824. On June 30, 2010, Johnson's mortgage lender, Taylor Bean & Whitaker ("TBW"), filed notice with the trial court of the automatic stay stemming from its prior bankruptcy filing of August 24, 2009. CP 12-13. Because TBW was the named insured on the Policy, it necessarily had to be named on any structure payments made by Mt. Vernon. CP 1746. On January 21, 2011, Johnson informed Mt. Vernon that TBW had assigned its servicing rights to his loan to a company called Cenlar. CP 1747. Mt. Vernon issued its final structure payment of $33,949.40 on February 9, 2011 after it confirmed that Cenlar could be named as a payee in lieu of TBW. CP 373. In total, Mt. Vernon paid Johnson $192,694.03.

C. Pertinent Facts Following the Filing of the Lawsuit

The complaint filed by Johnson alleged, among other things, that Mt. Vernon breached the insurance contract by failing to pay all ALE proceeds payable under the Policy and acted in bad faith and in violation of the insurance regulations contained in the Washington Administrative

Code ("WAC"). CP 1-11. Trial was initially scheduled for July 11, 2011, but was continued to October 3, 2011 at the request of Johnson.

On August 18, 2011, Johnson moved for summary judgment on, among other things, his breach of contract claim for ALE. Johnson argued in his briefing that he was entitled to his lost rental income, and the amount of the claim was based on the $1,800 per month rent purportedly paid by the Littles. In support of his motion, Johnson submitted his declaration wherein he stated that his renters had left the Rental Home just one or two months before the fire (which occurred on January 25, 2009), a statement we now know was a lie. CP 1625.

On August 31, 2011, Mt. Vernon deposed Johnson wherein he testified under oath and confirmed the existence of the previously submitted written lease and also testified that (1) he purchased the lease form at the University Book Store prior to its execution; (2) the lease was signed by himself and Mr. Little on May 15, 2008; (3) the Littles were in the larger upstairs portion of the Rental Home from May 2009 to December 2009; (4) the Littles paid $1,800 per month in rent; and (5) the monthly rent money was "ran through" his personal checking account with Bank of America. CP 496-97.

After being informed Mt. Vernon was in possession of his Bank of America statements for the months when the Littles leased his home, he

testified that (1) the Littles always paid cash; (2) he would use that cash to pay his expenses directly; and (3) in some months he would not deposit any rent money. CP 503-04.

Because Johnson's testimony was inconsistent, Mt. Vernon examined the lease document further and contacted the company who produced it. On September 7, 2011, Mt. Vernon obtained the Declaration of Elizabeth McDougall, the president of the company who published the lease form Johnson submitted. In her declaration, Ms. McDougall confirmed that one of the pages contained in the alleged lease was not published and available for sale to the public until March 2009, which was ten months after Johnson claimed to have executed it. CP 829-835.

Johnson filed his reply brief in support of his Motion for Summary Judgment on September 12, 2011, wherein he continued to deny any wrongdoing stating "[he] did not commit fraud or willfully misrepresent the existence of his renters." CP 836-37. Thus, while Johnson did not deny that the lease itself was a fake, he continued to assert that the Littles rented from him, he had acted appropriately, and any misrepresentations were not material. CP 840-43. Johnson did not submit another declaration or otherwise provide additional testimony in support of his summary judgment motion.

On September 13, 2011, Mt. Vernon moved for a trial continuance and for leave to amend its answer to include the affirmative defense of misrepresentation and fraud based on its eleventh hour discovery of the forged lease. CP 1721. Johnson vehemently opposed the motion arguing he would be prejudiced by a trial continuance. The trial court granted the motion, but only continued the trial date one week from October 3, 2011 to October 10, 2011 and did not allow any further discovery on the misrepresentation/fraud defense.

On September 15, 2011, Johnson's summary judgment hearing took place and the trial court orally ruled that Johnson's motion should be denied except that he was entitled to ALE for the shortest period of time to repair his home. CP 1098. However, after the oral ruling and after Mt. Vernon's counsel had left the courtroom, Johnson's attorney had an order entered which incorrectly stated that Johnson was entitled to compensation for the reasonable lost rental income as an additional living expense under the Policy. CP 945. After seeing the order, Mt. Vernon objected to Johnson, but Johnson refused to agree to modify the order. CP 1083-85; CP 1101-02.

September 30, 2011 was an important day in the litigation for two reasons. First, Johnson filed his motions in limine, in which he explicitly admitted – in his briefing and through his attorney's statements – that he

had forged the lease submitted to Mt. Vernon. CP 968; CP 971; CP 983-91. However, now Johnson asserted in his briefing that he had an oral lease with the Littles, but that he forged the lease in order to reduce the terms of the oral lease to writing:

> **B. Johnson's Submittal of a False Lease**
>
> Johnson had an oral lease with Peter and Evon Little for his Seattle rental house prior to the fire loss. John Larson and Jarie Croft, who live next-door to the Seattle house, will testify that the Littles did in fact live in Johnson's rental home. During the litigation, Johnson reduced the terms of the oral lease to a written lease agreement. Although the written reproduction contained the purported signature of Mr. Little, Mr. Little never signed a written lease for the rental property.
>
> The written lease was submitted to Mount Vernon long after it had made its coverage decision on Johnson's loss of rents claim. All of the terms contained in the written lease were correct and Mount Vernon never relied on, or changed its position, because of the submitted lease. Mount Vernon's records show it found the submitted lease to be irrelevant.

CP 971. However, Johnson did not provide any testimony about his alleged oral lease; instead, he stated within his brief that he had an oral lease with the Littles. *Id.* Johnson's attorney, however, did provide testimony in his supporting declaration stating that "Mt. Vernon has provided evidence that the lease provided by Johnson in November 2009 was not authentic," but that "[t]here is no evidence that Johnson charged

the Littles a different rate than what was indicated on the lease he submitted." CP 987 at ¶ 16.

Second, Johnson informed Mt. Vernon on Friday, September 30, 2011, that he had found new evidence in the basement apartment on the Rental Home that had not been previously disclosed: a cardboard box containing the true names of his renters. CP 1683; CP 1870-71. Mt. Vernon inspected the new evidence that same day; it revealed that Johnson had been misrepresenting the names of his renters to Mt. Vernon. "Pete Little" was actually "Dean Little" and "Evon Little" was actually "Yvonne Mokihana Calizar." *Id.*

On September 30, 2011, Mt. Vernon also filed a Motion for Revision of Order Granting Partial Summary Judgment to Plaintiff because it did not accurately reflect the trial court's oral ruling and because Johnson had the order entered after Mt. Vernon's counsel had left the courtroom. CP 1070-76.

Armed with the actual and true names of Johnson's alleged renters, Mt. Vernon spent the following two weekend days attempting to locate Mr. Little and Ms. Calizar. CP 1199-1200; 1817-35. Mt. Vernon located Mr. Little and Ms. Calizar at a farmers market on Whidbey Island on Sunday, October 2, 2011; however, they fled the scene and would not speak with Mt. Vernon stating that they did not want to get involved.

CP 1819-20. The next day, on Monday, October 3, 2011, Mt. Vernon had a process server attempt to locate Mr. Little and Ms. Calizar to serve them with trial subpoenas, which was successfully done on October 5, 2011. CP 1199-1200; 1820.

On October 3, 2011, Mt. Vernon made a Motion for Judgment as a Matter of Law based on (1) its discovery that the lease was bogus because page two of the lease was not in existence when Johnson claimed to have executed it, and (2) Johnson's admission in his motions in limine that he had created a false lease and submitted it in order to obtain additional ALE money. CP 1106-21.

On October 6, 2011, Mt. Vernon learned that Johnson had not only lied about the existence of the written lease, but that he had lied about all of the relevant terms of the lease. After being served with the trial subpoenas for him and his wife, Mr. Little telephoned Mt. Vernon's attorneys and informed them that they did not want to come to Seattle to testify due to his wife's health issues. CP 1200. Importantly, Mr. Little informed Mt. Vernon that he and his wife had lived in the basement apartment of the Rental Home (*not* the larger upstairs portion) from May 2008 to March 2009 (*not* from May 2008 to November 2008) and paid Johnson $750/month in rent (*not* $1,800/month) plus a share of the

utilities. *Id.* Mr. Little agreed that he would sign an affidavit containing his testimony in hopes of avoiding having to appear at trial. *Id.*

On October 7, 2011, Mt. Vernon filed its Supplementary Submission in support of its Motion for Judgment as a Matter of Law and the Affidavit of Dean Little. CP 1191-95; 1809-10. In his affidavit, Mr. Little confirmed under oath that he and his wife had lived in the basement apartment of the Rental Home from May 2008 to March 2009 and paid Johnson $750/month in rent plus a share of the utilities. CP 1809-10.

On October 7, 2011, Johnson also filed his reply brief in support of his motions in limine. Therein, Johnson now admitted that there was evidence he had lied about the term of the lease, the space rented to the tenants, and the amount of monthly rent he was paid. CP 1996-2006. Johnson did not submit any evidence even tending to rebut or controvert Mr. Little's affidavit testimony. *Id.*

That same day, Johnson also submitted his response to Mt. Vernon's Motion for Revision of Order Granting Partial Summary Judgment to Plaintiff. CP 2008-17. In his response, Johnson joined in Mt. Vernon's motion and stated that he agreed he had no ALE claim in an attempt to keep the forged lease out of evidence at trial. *Id.*

On October 10, 2011, the morning of trial, Johnson filed a short response to Mt. Vernon's Motion for Judgment as a Matter of Law. CP 1246-48. In his response, Johnson did not deny or otherwise attempt to rebut Mr. Little's testimony; rather he asserted that the motion was untimely and futile. *Id.*

The parties appeared for trial on October 10, 2011 and the trial court heard oral argument on Mt. Vernon's Motion for Judgment as a Matter of Law. CP 1326. Following a break for lunch and some additional oral argument on the matter, the Court ruled that all of Johnson's claims against Mt. Vernon were dismissed with prejudice on the basis that there was no factual issue for trial given Johnson's admitted fraud wherein he forged a lease containing terms which were materially different than the actual terms, including the misrepresentation of the amount of rent received, the space being rented, and the term of the lease. CP 1326-27. The trial court did not enter an order at that time and requested that the parties attempt to agree on an order.

On October 13, 2011, the trial court entered an order vacating the partial summary judgment order previously entered in favor of Johnson to reflect its oral ruling that "Johnson was entitled to ALE coverage under the terms of the Policy." CP 1328-29.

Before the parties could agree on a order granting Mt. Vernon's motion, Johnson moved for reconsideration. CP 1333-45. After hearing oral argument on November 18, 2011, the trial court denied Johnson's motion and entered the order granting judgment to Mt. Vernon as a matter of law given Johnson's admissions and failure to submit any rebuttal evidence. CP 1655-62.

Following the denial of his motion for reconsideration, Johnson filed his notice of appeal on the sole issue that the trial court erred in dismissing his bad faith and CPA claims on Mt. Vernon's Motion for Judgment as a Matter of Law. Johnson has not appealed the trial court's dismissal of his sole contractual claim for additional ALE.

IV. ARGUMENT

A. Standard of Review of CR 50 Motion

CR 50 provides a means for a trial court to expedite a decision on the merits and render a decision in a jury trial when there is clearly no issue of fact for the jury to consider. CR 50 motions may be brought at any time before the case is submitted to the jury. CR 50 (a)(2); *Mega v. Whitworth College,* 138 Wn. App. 661, 668, 158 P.3d 1211 (2007).

Appellate courts review CR 50 motions using the same standard as the trial court. *Sing v. John L. Scott, Inc.,* 134 Wn.2d 24, 29, 948 P.2d 816 (1997). In ruling on such a motion, the trial court must accept the truth of

the opponent's evidence and all inferences that can reasonably be drawn from it. *Queen City Farms, Inc. v. Central Nat'l Ins. Co.,* 126 Wn.2d 50, 98, 882 P.2d 703 (1994). "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence 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, 948 P.2d 816. Thus, if no justifiable evidence exists on which reasonable minds might reach conclusions consistent with the verdict, the issue is not appropriate for a jury. *Queen City Farms*, 126 Wn.2d at 98.

B. *Mutual of Enumclaw v. Cox* and Its Progeny Bar Johnson's Extra-Contractual Recovery Given His Intentional Material Misrepresentations Made to Mt. Vernon

A long line of Washington cases has held that an insured who lies to his insurance company about material facts is not entitled to coverage or any extra-contractual recovery. The first such modern case is *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643 (1988). Mutual of Enumclaw ("MOE") insured a home owned by Dr. Cox, which was destroyed by fire. Dr. Cox claimed that the contents of the home were worth far in excess of the policy's contents limits ($324,420 versus $137,000). *Id.* at 645-46. Dr. Cox submitted a contents claim that listed several items that should have been found when technicians sifted through the burnt home's rubble,

such as bronze statues, jewelry, and other items that would not be completely destroyed by fire. *Id.* at 648.

MOE sued for declaratory relief that it should not have to pay any benefits under the policy, on account of its "void for fraud" clause. Dr. Cox asserted counterclaims alleging that MOE, in processing his claim, dealt in bad faith and committed numerous unfair and deceptive practices and violations of RCW 48.01.030, RCW 48.30.010, WAC 284-30-300, *et seq.*, and RCW 19-86.020. *Id.* at 646-47. One bad faith allegation was that MOE induced Dr. Cox's fraud because it did not assist him in filling out his inventory list of unscheduled personal property which contained the misrepresentations that formed the basis of MOE's coverage denial. *Id.* at 650.

The case went to trial, and the jury found, on the verdict form, that Dr. Cox committed fraud or false swearing, and then went on to find for Dr. Cox on his claims for estoppel, bad faith, and other theories. *Id.* at 647-8. The trial court entered judgment notwithstanding the verdict on the estoppel claim. *Id.* at 648. On direct appeal to the Washington Supreme Court, judgment for MOE was entered. This was because first, the void for fraud clause affected all coverages in the policy and therefore Dr. Cox was entitled to no contractual recovery at all, second, Dr. Cox – having committed fraud – had unclean hands and therefore could not seek the

equitable remedy of estoppel, and third, Dr. Cox was not entitled to recover on his extra-contractual claims.

Importantly, the *Cox* court made these rulings notwithstanding a jury finding in Dr. Cox's favor on estoppel, contractual damages, and CPA and WAC violations. Next, it is also important to note that the court adopted a broad construction of "material" for purposes of insurance claims; the court rejected the notion that since the value of the property far exceeded the limits, the fraud in claiming lost items that were not indeed lost was immaterial. Rather, the court said that "dishonesty by insureds cannot be ignored." *Id.* at 649. Finally, the court ruled that proving prejudice to the insurer was not required.

MOE v. Cox has become the basis for Washington's anti-fraud jurisprudence. In *Onyon v. Truck Ins. Exch.,* 859 F. Supp. 1338 (W.D. Wash. 1994), the court held that materiality of the misrepresentation may be determined as a matter of law; and a misrepresentation is material if a reasonable insurance company would attach importance to it. *Id.* at 1341. That court also said that failing to disclose information is a misrepresentation as well. Like the court in *Cox*, the *Onyon* court denied the insured any recovery, dismissing the case on summary judgment.

In *Wickswat v. Safeco Ins. Co.*, 78 Wn. App. 958, 904 P.2d 767 (1995), the insured claimed that his model train collection had been stolen.

The jury found that there had indeed been a theft, but also that the insured had "misrepresented material facts during the course of the claim." *Id.* at 966. The verdict form instructed the jury to stop deliberating if it found that the insured had made material misrepresentations. *Id.* The Court of Appeals held that the verdict form – instructing the jury to stop deliberating if it found misrepresentation – was correctly given pursuant to *MOE v. Cox*. After exhaustively discussing *Cox*, the court said:

> The factual scenario provided in *Cox* is nearly identical to the present case. In particular, in both cases there was evidence that the insured attempted to defraud its insurer during the claims process. Accordingly, based on the clear holding in *Cox,* we find that the trial court in this case correctly directed the jury not to consider Wickswat's bad faith and CPA violation claims if it found that he intentionally misrepresented or concealed material facts during the claims process. Indeed, the trial court's verdict form reflects an approach consistent with *Cox.*

Id. at 971. Three years later, the Court of Appeals made a similar ruling in *Tornetta v. Allstate Ins. Co.*, 94 Wn. App. 803, 973 P.2d 8 (1999), holding that misrepresentations by the insured negated his rights under the contract, and his claims under the CPA and for bad faith.

The recent case *Kim v. Allstate Ins. Co.*, 153 Wn. App. 339, 223 P.3d 1180 (2010), is the latest statement of our courts' distaste for insurance fraud. There, as here, the insured made misrepresentations to the insurer in the course of the insurer's adjustment of the claim, and there

was no question about the falsity of the statements. So, the court focused on materiality of the misrepresentations. The court's discussion on materiality merits quoting at length:

> The key question here is whether Kim's misrepresentations were material. A misrepresentation is material if it involves a fact that is relevant to the claim or the investigation of a claim. While materiality is generally a mixed question of law and fact, we may decide the issue as a matter of law "'if reasonable minds could not differ on the question.'" . . .
>
> Materiality is determined from the standpoint of the insurer, not the insured. A misrepresentation is material "'if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented.'" [citing cases] (restating the standard as "'***the materiality requirement is satisfied if the false statement concerns a subject relevant and germane to the insurer's investigation as it was then proceeding***.'"). . . .
>
> In order to avoid liability based on a material misrepresentation, the insurance company must demonstrate that the insured knowingly made the untrue representations and that, in making those representations, the applicant intended to deceive the company. ***But if an insured knowingly makes a false statement, courts will presume that the insured intended to deceive the insurance company***. If the insured knowingly made a false statement, the burden shifts to the insured to establish an honest motive or an innocent intent. The insured's bare assertion that she did not intend to deceive the insurance company is not credible evidence of good faith and, in the absence of evidence of good faith, the presumption warrants a finding in favor of the insurance company.
>
> When an insured intentionally makes material misrepresentations regarding a claim for insurance coverage, any claim by the insured against the insurance company for bad faith and CPA violations must fail.

Id. at 354-6 (emphasis added). It is also important to remember that an insurer need not be prejudiced by the insured's misrepresentation; materiality alone is required. *Cox*, 110 Wn.2d at 648-9; *Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 540, 94 P.3d 358 (2004). The foregoing is a current, comprehensive statement of the rules this court must apply to this case in its appellate review. When we do so, the conclusion that the trial court's dismissal of Johnson's extra-contractual claims against Mt. Vernon was proper is inescapable.

C. There Is No Substantial Evidence or Reasonable Inference in the Record to Sustain a Verdict for Johnson Given His Admitted Fraud

Taking into consideration all of the evidence in the record before the Court, there is no factual issue for a jury to consider. As a result, the trial court's dismissal pursuant to CR 50 was proper.

1. Johnson admits making several misrepresentations of fact

Johnson submitted a written lease to Mt. Vernon in November 2009 in order to obtain additional ALE proceeds he alleged were owed under the Policy. CP 775; 810-12; 814-15. Johnson confirmed the genuineness of the written lease at his deposition. CP 495-96. Additionally, Johnson confirmed at his deposition that (1) his renters were named Pete and Evon Little; (2) the lease ran from May 15, 2008 to

sometime in December 2008; (3) the Littles rented the 2,500 square foot main portion of the Rental Home; and (4) paid $1,800 per month in rent.

Following Johnson's deposition, Johnson's fraud was discovered when Mt. Vernon obtained a declaration from Elizabeth McDougall, the president of Washington Legal Blank, the company that produced the lease forms that Johnson used. CP 829-35. In her declaration, Ms. McDougall testified that the second page of Johnson's purported lease was not made available to the public until sometime in 2009, which made the execution date of the alleged lease, May 15, 2008, impossible to have occurred when Johnson testified it did. *Id.*

In his responsive pleading dated September 12, 2011, Johnson did not deny the written lease was a fake. Instead, he attempted to preclude Mt. Vernon from relying on a fraud/misrepresentation defense because it was untimely and caused him prejudice. CP 836-44. On September 30, 2011, however, Johnson's counsel conceded that his client fabricated a counterfeit lease document, which was submitted to Mt. Vernon in support of his ALE claim and now argued that Johnson had an oral lease. CP 971. But Johnson's counsel insinuated that the terms (rent amount, period of tenancy, portion of the premises rented) was true. CP 987 at ¶ 16.

That same day, Johnson's counsel disclosed to Mt. Vernon's counsel the true names of the two persons who Johnson alleged leased the

Seattle rental house from him – "Dean Little" and "Yvonne Mokihana Calizar," another misrepresentation by Johnson. CP 1870. Finally given the real names of his alleged tenants, Mt. Vernon found Mr. Little and Ms. Calizar three days later – and just a week before trial. CP 1817-21.

On October 6, 2011, Mr. Little provided his affidavit, which confirmed that Johnson had not only lied about the existence of the written lease and the names of the renters, but also about important terms of the lease. CP 1809-10. Mr. Little testified that he and his wife did not sign a written lease, but they rented the small basement apartment from May 2008 to March 2009 for $750 per month – all of which contradicted Johnson's sworn testimony:

The Fake Lease (Oral or Written)	**The Real Agreement**
• The Littles rented the upstairs, 2,500 square foot portion of the Rental Home	• The Littles rented the downstairs or basement apartment
• The Littles paid $1,800 per month in rent to Johnson	• The Littles paid $750 per month in rent to Johnson
• The Littles moved into the upstairs in May 2008, and moved out in December 2008	• The Littles moved into the downstairs in May 2008, and moved out in March 2009

Following submission of Mr. Little's affidavit, Johnson admitted in his Reply Brief in Support of his Motions in Limine that his prior statement that there was no evidence the forged lease misrepresented the terms of the oral lease with the Littles was incorrect and that he

misrepresented several terms of the oral lease. CP 1996-97. Johnson, however, did not provide any competent testimony that rebutted Mr. Little's affidavit.

The record before the Court reflects that Johnson's numerous misrepresentations are either undisputed or admitted by Johnson. Importantly, the testimony of Ms. McDougall and Mr. Little have never been rebutted by Johnson – namely that the written lease submitted to Mt. Vernon was forged and contained false terms.

2. Johnson's misrepresentations were material and he does not argue otherwise

A misrepresentation is material if it involves a fact that is relevant to the claim or the investigation of a claim from the perspective of the insurer. *Onyon*, 859 F. Supp. at 1341. Materiality is determined from the standpoint of the insurer and not the insured. *Id.* at 1342. In this instance, Johnson's lies were clearly material to Mt. Vernon's claim investigation as the counterfeit lease containing several false terms was submitted in order to obtain additional ALE benefits. Johnson demanded $1,800 per month for ALE coverage and he and his attorneys submitted the fake lease as evidence of the same. CP 810-16. The lease was clearly material to Mt. Vernon's claim investigation as it related to Johnson's ALE claim and

Johnson has not raised materiality of his misrepresentations as an issue on appeal; thus, this Court must find that they were.

3. Johnson's misrepresentations were intentional and he does not argue otherwise

Misrepresentations made by an insured are presumed to be made with an intent to deceive. *Kim v. Allstate Ins. Co.*, 153 Wn. App. 339, 355, 223 P.3d 1180 (2010). Here, there is no dispute that Johnson's misrepresentations were made intentionally as he or his attorney have admitted the same. CP 971; 987; 1996-2006. A lawyer's actions are binding upon the client. *Rivers v. Washington State Conf. of Mason Contractors*, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002). Again, Johnson has not raised the intentionality of his misrepresentations as an issue on appeal; thus, this Court must find that they were.

4. Johnson's expert testifies that Johnson's actions were fraudulent

Before Mt. Vernon uncovered the extent of Johnson's fraud, his "claims handling bad faith" expert, Gary Williams, provided prophetic testimony at his deposition that Johnson's actions amounted to insurance fraud:

> Q. Well, let's assume –
>
> A. If it's done with intent to get more money on the ALE claim than he deserves, then it's fraud. If it's not done with that intent, then it's not.

Q Let's assume there was a dispute over whether he should be paid, like $1250 a month versus $1800 a month and the insurance company representative said, "We don't think it's costing you $1800 a month. Can you give us some documentation to show that you are foregoing rent in the amount of $1800 a month to live there," ***is it fraud for him to go back then and create a lease that didn't exist in the first place and submit it to the insurance company?***

A. ***It is if he is intentionally trying to collect more money than his claim should be. If he was renting it to Mr. Little for $1250 a month instead of $1850 a month and he says in this writing it was $1850 a month, that's one thing.*** If he was renting it to Mr. Little for $1850 a month and believes he was supposed to come up with some paperwork, that's not.

Q. What if he was not renting it to anybody?

A. That would not be good for Mr. Johnson.

Q. What if he was renting it for a thousand dollars a month?

A. Then he would be misstating the amount of rent that he was receiving.

CP 1243-45. So, according to his own expert witness, Johnson has committed fraud in claiming that he was renting the upstairs to his tenants for $1,800 per month, when in fact, he was renting the smaller basement apartment to his tenants for $750 per month.

D. Johnson's Argument that *Mut. of Enumclaw v. Cox* Does Not Apply When an Insurer Violates the CPA or Acts in Bad Faith Prior to a Misrepresentation Is Without Merit

Johnson argues that the holding in *Mut. of Enumclaw v. Cox* is inapplicable where an insured alleges bad faith conduct on behalf of an insurer that precedes the misrepresentation. This argument is wholly without merit.

1. Dr. Cox alleged that MOE acted in bad faith prior to his misrepresentations and it made no difference

Johnson disingenuously argues that no Washington court has ever applied *Cox* to preclude extra-contractual claims where the insurer's alleged bad faith conduct precedes an insured's misrepresentation. However, Johnson appears to have not considered the facts of *Cox* in reaching this conclusion.

In *Cox*, the insured alleged that his insurer violated Washington's insurance regulations by, among other things, failing to aid him in filling out his inventory of certain personal property. *Cox* at 647; 650. This alleged WAC violation would necessarily have preceded Cox's fraudulent conduct because Cox's misrepresentations were contained on the very document upon which he alleges that his insurer failed to assist him with. Thus, Cox's fraud clearly came after the insurer's alleged bad faith conduct – yet the court allowed the insurer to rely on a fraud defense and precluded all of Cox's claims against the insurer. Moreover, the *Cox* court

considered and rejected the same argument being made in this case – that the insurer somehow induced the insured to commit insurance fraud. *Id.*

Johnson's statement that no Washington court has ever applied *Cox* retroactively to alleged bad faith conduct which precedes an insured's fraud is incorrect as the *Cox* court did exactly that. As *Cox* makes clear, the timing of Johnson's fraud has no bearing on whether he can maintain bad faith and CPA claims so long as they were made in the claim process. This rule was eloquently stated in *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 415, 36 P.3d 1065 (2001): "in the interests of discouraging insurance fraud, the court held that fraud at any point in the claims process voids the entire contract, whether or not relied on by the insurer." *Cox* is clearly applicable here.

2. Other case law cited by Johnson is distinguishable

Johnson cites three cases in support of his argument, all of which are distinguishable from and inapplicable to the facts in this case. The first case is *Strother v. Capitol Bankers Life Ins. Co.*, 68 Wn. App. 224, 842 P.2d 504 (1992). There, this Court held that a life insurance beneficiary can maintain a CPA claim against a replacement life insurance company which failed to provide a statutory replacement notice even when the applicant misrepresented certain facts on the life insurance question.

The second case is *Ellis v. William Penn Life Assur. Co. of Am.*, 124 Wn.2d 1, 873 P.2d 1185 (1994), which also involved a beneficiary who sued a replacement life insurance company. The appeal of this decision was consolidated with the appeal of *Strother* from this Court. In both of these cases, the Supreme Court carved out a limited exception to the "clean hands" doctrine where a party can assert an equitable estoppel claim against an replacement life insurer in order to protect the interest of innocent third party beneficiaries who were held responsible for misrepresentations made by a life insurance applicant in his life insurance application.

However, this Court's decision in *Wickswat*, *supra*, provides guidance as to the inapplicability of *Strother* and *Ellis* in first-party property claims where an insured has committed insurance fraud.

> As Safeco contends, the supreme court did not intend for *Ellis* to overrule *Cox.* Rather, *Ellis* merely sets forth a limited exception to the "unclean hands" rule, which was applied in *Cox*, in the context of replacement life insurance. In particular, *Ellis* stands for the basic proposition that it would be unfair, in the context of replacement life insurance, to bar an innocent beneficiary from claiming the benefit of equitable estoppel when *both* the insurer and insured engaged in wrongful acts. The same fairness and policy considerations simply do not apply in either *Cox* or the present case where no third party beneficiaries are involved. We therefore reject *Wickswat*'s claim of error and hold that the special verdict form was properly given under *Cox.* The judgment is affirmed.

Wickswat, 78 Wn. App. at 975.

Both *Strother* and *Ellis* involved innocent parties who were being denied coverage due to a deceased life insurance applicant's misrepresentations on the insurance application, which were imputed to the life insurance beneficiary. This decision makes it crystal clear that the *Strother* and *Ellis* decisions do not apply to situations such as Johnson's, where the party seeking to benefit from the CPA is the party who committed the insurance fraud because "the same fairness and policy considerations simply do not apply in either *Cox* or the present case where no third party beneficiaries are involved." The same holds true in this case and *Strother* and *Ellis* are inapplicable to the facts of this appeal.

Johnson also relies on *Barton*, *supra*, the facts of which do not apply to this case. In *Barton*, an insured made a claim to his property insurer for fire damage to a tractor. *Barton*, at 409. Although the insurer suspected the insured of arson, it nonetheless paid the claim and had the insured sign a settlement agreement. *Id.* Then, the day after issuing the settlement check, the insurer was informed by law enforcement that the insured had not been ruled out as a suspect in the arson. Thereafter, the insurer stopped payment on the settlement check, reopened its investigation, and sued for declaratory judgment that the insurance policy was void. *Barton*, at 410-11. At trial, the jury declined to find the insured

responsible for the arson, but entered verdict in favor of the insurer on the basis that the insured's misrepresentations made six weeks after the settlement were material and barred coverage. *Barton*, at 41. The insured appealed.

On appeal, the Court of Appeals, Division 3, distinguished *Cox* by finding that the misrepresentations in that case were made during an ongoing claim investigation where the insurer's payments were partial payments, not a full and final settlement. *Barton*, at 415-16. In *Barton*, the misrepresentation were made six weeks *after* the insurer had made a full and final settlement of the claim. Thus, the appellate court held that they could not have been material because they could not have been made for purposes of inducing the settlement. *Barton*, at 416.

Here, Johnson's misrepresentations came during Mt. Vernon's claim investigation and Mt. Vernon's final ALE payment of $7,500 came after his misrepresentations. The holding of *Barton* is not applicable given the undisputed facts of this case.

3. The public policy considerations in Cox are present here and dictate affirming of the trial court's decision

In *Cox*, the Supreme Court made a public policy decision not to reward those who commit insurance fraud:

> However, the purpose of the CPA will not be served by awarding damages, attorney fees, and costs to Cox after he

> tried to perpetuate 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, at 652-53.

Moreover, the *Barton* court considered, but did not find, the policy considerations that drove the *Cox* decision. Mr. Barton did not set fire to the tractor and he did not try and recover more than the claim was worth. *Barton*, at 417. Here, Johnson did commit insurance fraud and has admitted to the same; thus, the policy considerations present in *Cox* are also present in this case. *Barton* is inapplicable to the facts here. *Cox* applies to preclude Johnson from maintain his bad faith and CPA claims in light of his admitted fraud.

Moreover, as indicated above in *Wickswat*, the policy considerations in *Strother* and *Ellis* – protecting innocent third parties who did not commit fraud – are not present here. *Wickswat*, at 974-75. Johnson committed fraud and has admitted to the same.

Johnson argues that he should be able to "fight fire with fire." However, Johnson didn't fight fire with fire; he fought wood with fire – *admitted* insurance fraud to combat *alleged* claim handling deficiencies. Put another way, Johnson argues that intentionally defrauding an insurer is acceptable where the insurer is accused of negligently adjusting a claim. This is ludicrous and would encourage insurance fraud, the very problem that *Cox* seeks to prevent.

E. Johnson's Argument About the CPA Extending Beyond the Parameters of the Insurance Contract is Inapplicable Here as He Is an Insured Under the Policy

Citing *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 54-55, 204 P.3d 885 (2009, Johnson states in his briefing that "the CPA extends beyond the parameters of any contract" because there is a "statutory mandate to liberally construe the CPA in order to protect the public. . . ." Appellant Brief at 44. It is unclear why Johnson has stated such given he is an insured under the insurance contract and would have the ability to bring a CPA action, if not for his admitted insurance fraud. The rule of law enunciated by Johnson merely gives those not in privity the ability to bring a CPA action. Johnson does not need to avail himself of this rule given his status as an insured.

F. Johnson's Attempt to Distinguish Cox Due to the Severability of the Insurance Policy is a Red Herring

Johnson states that "[t]he rule in *Cox* should not apply to Johnson's case because the applicable policy term is distinguishable from the policy term in *Cox*." Appellant Brief at 45. The "rule in *Cox*" that Johnson refers to, however, is that where an insurance policy contains "void for fraud" language, an insured cannot maintain a breach of contract claim even where the misrepresentation only affected one portion of the claim. In *Cox*, the insured argued that his fraud should only void the part of his policy dealing with unscheduled personal property and that he should still be able to maintain his claim for structure damage or other coverages. *Cox*, at 649-50. The court disagreed and voided the entire policy.

Here, however, there are no policy coverages to sever because Johnson's sole contractual claim before trial was his ALE claim, which was dismissed by the trial court on Mt. Vernon's motion due to his admitted fraud. Johnson did not appeal the trial court's decision to dismiss his ALE claim and even if he had, the "rule in *Cox*" does not apply because he had no other contractual claims to make even if the policy could be severed.

V. CONCLUSION

In his appeal, Johnson asks this Court to do away with twenty-five years of insurance fraud precedent and allow him, an admitted liar, forger and counterfeiter, to pursue bad faith and CPA claims against his insurer for its alleged negligent claim handling. *Mutual of Enumclaw v. Cox* makes clear that those who commit fraud cannot obtain CPA or bad faith remedies.

Johnson's argument that no Washington court has ever applied *Cox* to a situation where an insurer violates a claim handling regulation prior to the fraudulent conduct is without merit. The *Cox* court itself held – pursuant to a CR 50 motion – 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.*

Johnson's reliance on the *Ellis*, *Strother* and *Barton* cases is also misplaced. The *Ellis* and *Strother* decisions are limited to the context of replacement life insurance policies while *Barton* pertains to misrepresentations which occur after a full and final settlement of a claim. None of these cases are applicable to a first-party property case such as this.

Moreover, the public policy considerations in those cases are not present here. Johnson is not an innocent third party being bound by the misrepresentations of someone else – he has admitted to forging a written lease containing false terms in order to recover additional ALE money. Johnson did not reach a full and final settlement of his claims as the insured in *Barton* did, so there is no policy consideration to enforce a settlement agreements as there was in that case.

Simply put, Johnson is an admitted liar and fraud who, under well-established case law and public policy, cannot now sue his insurer for bad faith or CPA violations given the undisputed facts in this case. For these reasons, Mt. Vernon respectfully requests that this Court affirm the trial court's granting of its CR 50 Motion for Judgment as a Matter of Law.

RESPECTFULLY SUBMITTED this 30th day of July, 2012.

BETTS, PATTERSON & MINES, P.S.

By: _____

Joseph D. Hampton, WSBA #15297
Jeffrey S. Tindal, WSBA #29286
Betts, Patterson & Mines, P.S.
Attorneys for Respondent Mount Vernon Fire Insurance Company
One Convention Place, Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on July 30, 2012, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Mount Vernon Fire Insurance Company Brief; and**
- **Certificate of Service.**

Counsel for Appellant Johnson:
Michael T. Watkins
Joel B. Hanson
Law Offices of Michael T. Watkins
2825 Eastlake Avenue East, Suite 115
Seattle, WA 98102

☐ U.S. Mail
☑ Hand Delivery
☐ Telefax
☐ UPS

Counsel for Respondent Safeco:
David M. Jacobi
Shawnmarie Stanton
Wilson Smith Cochran Dickerson
901 Fifth Avenue, Suite 1700
Seattle, Washington 98164-2050

☐ U.S. Mail
☑ Hand Delivery
☐ Telefax
☐ UPS

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of July, 2012.

Valerie D. Marsh