

No. 63916-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

LEROY BUSHNELL, as personal representative of the Estate of
EVELYN BUSHNELL,

Plaintiff/Appellant,

v.

MEDICO INSURANCE COMPANY, a Nebraska Corporation, and
MEDICO LIFE INSURANCE COMPANY, a Nebraska Corporation,

Defendants/Appellees.

BRIEF OF APPELLANT

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I. INTRODUCTION

In October of 1986, Mrs. Evelyn Bushnell completed an application for the purchase of a skilled and intermediate nursing home policy offered by Medico Insurance Company. Broadly stated, the policy provided coverage for those needing daily nursing care, custodial care, and similar care for individuals who cannot properly care for themselves due to age, sickness, disease, or physical or mental impairment. The policy provided that, in order to be eligible for benefits, an insured must be confined to a nursing facility, have the confinement recommended by a physician, and start within fourteen days after a required hospital confinement of at least three days in a row. At the same time Mrs. Bushnell was applying for her long-term care insurance, Washington enacted RCW 48.84.060, which prohibited unfair or deceptive practices in the advertising, sale, or marketing of long-term health policies. The statute went into effect on November 1, 1986, and under the statute, the insurance commissioner was charged with adopting all rules necessary to implement the act by July 1, 1987. The remaining sections of the Long Term Care Act, RCW 48.84, took effect and applied to all policies issued on or after January 1, 1988. The regulations adopted by the Insurance Commissioner implementing the act eliminated any and all hospital stay requirements as

a pre-condition for coverage. WAC 284-54-150(6) provides that “No insurer may offer a contract which requires prior hospitalization as a condition covering institutional or community based care.”

Mrs. Bushnell paid her premiums to Medico for over twenty years. In February of 2007, while Mrs. Bushnell’s policy was in effect, her doctor recommended treatment in a skilled nursing facility. She was admitted to the facility directly from her home and her legal guardian submitted a claim for insurance benefits to Medico. Medico denied coverage, citing the policy’s hospital stay requirement as a pre-condition to coverage. Though her policy was in effect when the claim was made, Medico also denied coverage, contending that the policy had lapsed. This lawsuit followed. On June 4, 2009, Judge John Erlick ruled that because the policy was issued before the effective date of the Long Term Care Act, the hospital stay requirement remained a valid condition to coverage. This appeal followed.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The Trial Court erred in finding that the hospital stay requirement was a valid condition to coverage under Mrs. Bushnell’s policy.
2. The Trial Court erred in ruling Mrs. Bushnell was not entitled to coverage as a matter of law.

3. The Trial Court erred in finding that Medico did not commit an unfair or deceptive act in the sale and marketing of a long term care policy.
4. The Trial Court erred in finding that Medico acted reasonably in denying this Claim.
5. The Trial Court erred in denying Mrs. Bushnell her reasonable costs and attorneys fees.

Issues Pertaining to Assignments of Error

1. Insurers offering Long Term Care Insurance are prohibited from conditioning coverage on a hospital stay requirement.
2. Washington law removed the hospital stay requirement from Mrs. Bushnell's policy when she renewed it.
3. The Hospital Stay Requirement is void against public policy.
4. By raising an issue that had not been raised by the parties, the Court improperly injected an issue into the case that should not have been raised.
5. Under Washington law, Medico is estopped from raising the issue the Court injected into the case.
6. The issue the Court injected into the case requires evidence of intent, and there is no factual basis from which the Court could conclude that the parties intended the result adopted by the Court.

7. Medico's sale and marketing of this policy was misleading and deceptive in that it failed to address the impact a hospital stay requirement would have on coverage.

8. Medico's sale and marketing of this policy was misleading and deceptive as it failed to market this policy as a continuous contract.

9. Medico did not conduct a reasonable investigation into Mrs. Bushnell's claims.

10. Medico did not act in good faith toward its insured.

III. STATEMENT OF THE CASE

A. The Parties

Petitioner Leroy Bushnell is and was the attorney in fact and legal guardian of his elderly mother, Evelyn Bushnell. CP 11 Mrs. Bushnell passed away on August 28, 2008. CP 136 Leroy Bushnell is also the executor of her estate. CP 237 Medico Insurance Company ("Medico") is or was an insurance company offering skilled and intermediate nursing policies to individuals desiring coverage for care when they become incapacitated. The policy Medico issued to Ms. Bushnell is categorized as a "Long Term Care Policy" under RCW 48.84. et. seq.

B. Background

In 1986, Leroy Bushnell was the attorney in fact for his mother, Evelyn. CP 197-198 Leroy was concerned about the costs of skilled and

intermediate nursing for his mother's care, should that need ever arise. CP 371 After reading of about several insurance companies who offered nursing care policies, Leroy Bushnell contacted Medico to inquire about nursing home policies. Id. He called Medico's toll free telephone number, and Medico's agent then contacted him to discuss insurance policies offered by Medico. Id. Medico's agent traveled from his office in Portland Oregon to Leroy Bushnell's business in Renton, Washington, making a personal sales call upon him. Id. Medico advertised itself as "a leader in the health insurance field". Id. Medico specifically sought to develop a relationship of trust, informing its insureds that their goal was to "build confidence and trust, and a long-lasting relationship." CP 382

After explaining that he desired to purchase nursing home coverage that would cover his mother in her later years, Medico's agent informed Leroy Bushnell that Medico offered such a policy. CP 371 Medico's agent provided Mr. Bushnell with an application for insurance and instructed him to fill out the application. He did and his mother then signed the application. CP 384-385. Neither Medico nor its agent ever informed Mr. Bushnell that a three day hospital stay would be required as a condition of coverage, nor did Medico or its agent inform Mr. Bushnell that individuals who suffer strokes or otherwise need nursing home care are admitted to nursing care facilities directly from home or without

hospital stays. CP 371 No hospital stay requirement was discussed as part of the application process. Id.

After completing the application, there was a delay in processing the application while the insurance company requested information from Evelyn Bushnell's doctors. CP 372, 389 In January of 1987, the policy was issued to Mrs. Bushnell. CP 372, 391 The letter accompanying the policy from Medico's agent, Francis Martinez, stated "As with a fine wine aging makes [the policy] better." CP 391 When Mrs. Bushnell completed her six month waiting period for pre-existing injuries, Medico sent Mrs. Bushnell correspondence reminding her of "the valuable protection your policy provides you now and in the future as health care expenses continue to rise." CP 393 Mrs. Bushnell paid premiums on the policy for 21 years. CP 372, 41 In 2006, Mrs. Bushnell could no longer live independent of others and relocated her residence to live with her son so that he could care for her.

In February of 2007, Evelyn Bushnell required nursing home care and was admitted to Lake Vue Gardens in Kirkland, Washington directly from her home.¹ Her doctor, Dr. Mark Levy, determined that she had suffered a stroke and would require long term care. CP 334 While the

¹ Prior to that time, Leroy Bushnell had been contracting convalescent care in his home and had submitted a claim to Medico for coverage, which Medico denied because of the hospital stay requirement. CP 373

policy was in effect, Leroy Bushnell submitted a claim to Medico on Evelyn's behalf. CP 334 Since coverage under the policy was triggered by "contingent" events (the need for long term care) and included a defined benefit, and since Evelyn Bushnell had been admitted into a nursing home with no prospect of recovering and being sent home with a need for the start of new nursing coverage in the future, Leroy Bushnell stopped paying Medico's premiums at that time. Several months after Ms. Bushnell was admitted into the nursing home, and after Leroy Bushnell ceased paying the premiums, Medico denied the claim contending that coverage under the policy was conditioned on a three day hospital stay. CP 47-48 Medico also asserted that the policy had lapsed. Id.

C. Medico's Policy

Broadly stated, Medico's policy provided coverage for those needing daily nursing care, custodial care, and similar care for individuals who cannot properly care for themselves due to age, sickness, disease, or physical or mental impairment. CP 30-37 The specific policy terms, however, stated:

**Part G Skilled Nursing Care and Intermediate Nursing Care
Benefits**

To be eligible to receive benefits under Part G(a) and Part G(b), your confinement must:

- (1) be in a Nursing Facility;
- (2) be recommended by a physician;
- (3) start within 14 days after required hospital confinement of at least three days in a row; and
- (4) be for the continued treatment of the condition(s) for which you were in the hospital.

CP 32

D. RCW 48.84.060

In 1986, Washington enacted RCW 48.84.060, which prohibited unfair or deceptive practices in the advertising, sale, or marketing of long term health policies. The statute went into effect on November 1, 1986, and under the statute, the insurance commissioner was charged with adopting all rules necessary to implement RCW 48.84.060 by July 1, 1987. The remaining sections of RCW 48.84 took effect and applied to all contracts issued on or after January 1, 1988. RCW 48.84.910. Pursuant to the enabling statute, the insurance commissioner drafted WAC 284-54 et. seq. WAC 284-54-150(6) provides that “No insurer may offer a contract which requires prior hospitalization as a condition covering institutional or community based care.”

E. Medico's Investigation Into Ms. Bushnell's Claim

On the day Mrs. Bushnell was admitted into the Lake Vue Gardens Nursing Home, Leroy Bushnell submitted a claim for benefits under the policy. CP 43, 334-335 The claim was received by Medico sometime later. Kimberly Jackson of Medico's claims department reviewed the Medico policy and Mrs. Bushnell's medical records, and noted the absence of a hospital stay before her admission to the facility. CP 314, 47-48. She did not see if the policy had been updated, or otherwise check to see if the hospital stay requirement remained valid. CP316, 59-71 She also noted Mrs. Bushnell's payments for coverage ceased once she was admitted to the nursing facility. On behalf of Medico, she then sent Mrs. Bushnell a denial of coverage, stating:

Based on the documentation received from Lake Vue Gardens, you were admitted directly in the nursing facility from your home. Since you did not have a prior hospitalization for at least 3 days before your admit into Lake Vue Gardens, the policy requirements have not been met and benefits cannot be provided at this time.

Also, please be advised that your long term care policy lapsed on 03-01-07 as we did not receive a renewal premium from you.
CP47

No other grounds for denying coverage were asserted by Medico.

Leroy Bushnell then retained counsel to inquire into whether Medico's denial of coverage was proper. On October 12, 2007, counsel for petitioner requested that Medico reconsider its denial of coverage. CP

50-51 Counsel noted that Washington's Long Term Care Insurance Act, RCW 48.84, specifically prohibits an insurer from requiring hospitalization as a condition of coverage. Upon receipt of Counsel's request to reconsider the denial of coverage, Shelly Richard of Medico then forwarded the correspondence to Medico's Vice President and Assistant General Counsel, Donald Lawler. CP 343, 70, 72 Mr. Lawler then affirmed Medico's denial of coverage. "Because the policy was issued prior to the effective date of either the statute or regulation, it did conform with the laws of the state of Washington on the policy date" was the reason Medico gave for upholding its denial of coverage. CP 53 Apart from asserting that the policy had lapsed, no other arguments or explanations for the denial of coverage were given by Medico.

F. Office of Insurance Commissioner

In correspondence dated November 9, 2007, Mrs. Bushnell then provided Medico with notice that she was contemplating a suit against Medico by providing the Washington State Insurance Commissioner's office with notice of a claim under RCW 48.30. CP 55-56 Medico responded to the Insurance Commissioner's Office inquiry by repeating its argument that the policy complied with Washington law when it was issued because the act post-dates the policy application. Again, Medico asserted its lapse argument, but no other arguments or explanations were

offered by Medico as a justification for its denial of coverage. After waiting the requisite time, Mrs. Bushnell then filed this suit for coverage and bad faith. CP 1-10.

G. Petitioner's Lawsuit and the Procedural History

After Mrs. Bushnell filed suit, written discovery was posed to Medico. Petitioner asked Medico to identify the steps it took to investigate Mrs. Bushnell's claims for benefits under the policy. CP 59-67 Medico simply looked at the policy language, and not at whether or not the statute had amended Medico's policy. Petitioner then moved for summary judgment on coverage and bad faith, contending that the hospital stay requirement was invalid. CP 80-96 Medico filed a cross motion for summary judgment, alleging that its denial of the claim was proper. CP 97-115 Medico again asserted that because Mrs. Bushnell applied for the policy before the Long Term Care Act went into effect, the policy complied with Washington law when it was issued. Apart from asserting that the policy had lapsed, no other arguments were made by Medico to support its denial of coverage. After filing its cross motion for summary judgment, Medico then moved to strike the summary judgment hearings, noting that Mrs. Bushnell had died and that the estate would need to be substituted in as plaintiff. CP 136-140 The Court granted Medico's motion to strike the hearings before Mrs. Bushnell was required to respond

to Medico's cross motion. CP 225-226 Medico also moved to continue the trial date. CP 227-233 Mrs. Bushnell opposed the request for continuance, noting that issues of law could be decided on the first day of trial. CP 234 The case was then assigned to the Honorable John Erlick for trial starting on June 9, 2009.

On June 3, 2009, Judge Erlick scheduled hearing on the motions for summary judgment for argument on June 4, and requested that Mrs. Bushnell provide a response to Medico's summary judgment motion. The Court also requested that the parties be prepared to discuss *Tebb v. Continental Casualty Company*, 71 Wn.2d 710, 714, 430 P.2d 597 (1967). Neither Medico nor Mrs. Bushnell had cited *Tebb* or otherwise argued its applicability in the summary judgment pleadings. Hearing was then held on June 4, 2009. Relying upon *Tebb*, the Court found that the hospital stay requirement remained a valid condition in Mrs. Bushnell's long term care policy, and that the Long Term Care Act did not apply. Upholding the three day hospital stay as a condition of coverage, the Court granted Medico's motion. The Court also found that Medico's argument that the policy had lapsed failed, but for the three day hospital stay requirement. Finding that Long Term Care Act did not apply to Medico, the Court also found that Medico did not breach its duty to act in good faith and conduct

a reasonable investigation before affirming or denying coverage. After a motion for reconsideration, this appeal follows.

IV. SUMMARY OF ARGUMENT

Mrs. Bushnell purchased a policy of insurance from Medico which contained a hospital stay requirement when it was first issued. Shortly after her policy was issued, Washington law eliminated a hospital stay requirement as a condition to coverage. Mrs. Bushnell renewed her policy many times over the years, and by operation of law, the hospital stay requirement would have been eliminated from her policy. The trial court erred in holding that the hospital stay requirement was a valid condition to coverage in Mrs. Bushnell's policy. After finding that the hospital stay requirement was valid, the Court also dismissed Mrs. Bushnell's claims for false and misleading statements in the sale and marketing of this policy, and for bad faith. These claims were dismissed in error. Issues of fact precluded the trial court from resolving these claims in favor or Medico.

V. ARGUMENT

A. The Standard of Review is De Novo

Questions of law, and interpretation of insurance contracts, are reviewed de novo. *Bordeaux, Inc. v. American Safety Insurance Company*, 145 Wn.App. 687, 693, 186 P.3d 1188 (Div.1, 2008), citing

Alask Nat'l Ins. Co. v. Bryan, 125 Wn.App. 24, 30, 104 P.3d 1 (2004),
review denied, 155 Wn.2d 1007, 120 P.3d 577 (2005). Insurance policies
are construed as a whole and given a fair and sensible construction.
Kitsap County v. Allatate Ins. Co., 136 Wn.2d 567, 575, 964 P.2d 1173
(1998). Courts “liberally construe insurance policies to provide coverage
wherever possible.” *Bordeaux*, 145 Wn.App. at 694, citing *Riley v. Viking
Ins. Co. of Wisconsin*, 46 Wn.App. 828, 733 P.2d 556 (1987). “If terms
are defined in a policy, then the term should be interpreted in accordance
with that policy definition.” *Kitsap County*, 136 Wn.2d at 576. “If terms
are not defined, then they are given their ‘plain, ordinary, and popular’
meaning.” *Bordeaux*, 145 Wn.App. at 694, quoting *Boeing Co. v. Aetna
Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). Any
ambiguity “must be given a meaning and construction most favorable to
the insured.” *Bordeaux*, 145 Wn.App. at 694, citing *Transcontinental Ins.
Co. v. Wash. Pub. Utils. Dists’ Util. Sys.*, 111 Wn.2d 452, 456-457, 760
P.2d 337 (1988). As noted previously by this Court, “[c]overage
exclusions ‘are contrary to the fundamental protective purpose of
insurance and will not be extended beyond their clear and unequivocal
meaning. Exclusions should also be strictly construed against the
insurer.’” *Bordeaux*, 145 Wn.App. at 694, citing *Stuart v. Am. States Ins.
Co.*, 134 Wn.2d 814, 818-819, 953 P.2d 462 (1998).

B. Trial Court Erred in Finding That the Hospital Stay Requirement Was a Valid Condition to Coverage Under Mrs. Bushnell's Policy.

At its heart, this case is very simple. In 1986, Ms. Bushnell completed an application for an insurance policy which contained a hospital stay requirement for nursing home care benefits. Shortly after completing her application, the state of Washington then enacted laws and regulations that *prohibited a hospital stay requirement as a condition of coverage*. While the policy she was issued dates back to the date of her application, it was issued after the long term care act took effect, and the Long Term Care Act governs the sale and marketing of this policy. Though the specific prohibition on conditioning coverage on a hospital stay was not in force when the policy was issued, the hospital stay requirement would have been eliminated from Mrs. Bushnell's policy by operation of law.

1. Insurers Offering Long-Term Care Insurance are Prohibited From Conditioning Coverage on a Hospital Stay Requirement.

The state of Washington has deemed it advisable to regulate insurance policies, including the insurance policy Medico sold to Mrs. Bushnell. "Long-term care insurance" is defined as "any insurance policy

or benefit contract primarily advertised, marketed, offered, or designated to provide coverage or services for either institutional or community-based convalescent, custodial, chronic, or terminally ill care.” RCW 48.84.020(1). Washington’s long-term care act, RCW 48.84 is to be “liberally construed to promote the public interest in protecting purchasers of long-term care insurance from unfair or deceptive sales, marketing, and advertising practices.” RCW48.84.010. Under the act, “No insurer may offer a contract which requires prior hospitalization as a condition covering institutional or community based care.” WAC 284-54-150(6) Though Medico has argued otherwise, this is a long-term care policy under Washington law.

2. Washington Law Removed the Hospital Stay Requirement from Mrs. Bushnell’s Policy When She Renewed It.

RCW 48.84.010 makes clear that the provisions of the long-term care act apply “in addition to the other requirements of Title 48 RCW.” RCW 48.84.010. Because insurance affects the public interest in this state “[n]o insurance contract shall contain any provision inconsistent with or contradictory to any such standard provision used or required to be used” in this state. RCW 48.18.130. There is no dispute in this case that Mrs. Bushnell’s policy with Medico was issued and in force on January 1, 1988. When Mrs. Bushnell renewed her coverage following the effective

date of the act, her policy would have been amended by operation of law to exclude the hospital stay requirement. Under RCW 48.18.280, when a policy of insurance is renewed, it is renewed under “a currently authorized policy form ... without requiring the issuance of a new policy.”

Mrs. Bushnell initially paid an annual premium under her policy. Under the express terms of her policy, her coverage **ended** “at 12’o’clock noon on the same standard time on the first renewal date.” CP 34 (“term of coverage”) Later, Mrs. Bushnell paid premiums quarterly, then monthly. Clearly, as of January 1, 1988, it was no longer appropriate for an insurance company to condition long-term care coverage in this state upon a hospital stay requirement. RCW 48.18.280 amends Mrs. Bushnell’s policy so that the policy conforms with the existing state regulatory requirements, without requiring an insurance company to issue a new policy. Medico’s policy would have been amended in 1988 by operation of law, and the hospital stay requirement would have been eliminated as a condition of coverage at that time. To hold otherwise would place Medico in violation of RCW 48.18.130, as Medico would be selling an insurance policy to Mrs. Bushnell that does not comply with the standard provisions that an insurance company is required to use in this state. The trial court erred in holding otherwise.

3. The Hospital Stay Requirement Is Void Against Public Policy.

Where provisions in an insurance policy are inconsistent with the public policies of this state, our courts have not hesitated to strike the inconsistent provisions. *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 95 Wn.2d 373, 1980. In the present case, Medico's General Counsel concedes that the laws of the State of Washington are indicative of the public policy considerations of the people of this state. CP 79 There is no dispute that the laws of Washington *currently* prohibit an insurance company from requiring a hospital stay as a condition of coverage, and have prohibited a hospital stay requirement since 1988. Prohibiting insurance companies from requiring a hospital stay as a condition of coverage is, and has been, the expressed public policy in Washington since 1988. To the extent that the insurance policy was not amended by operation of law when Mrs. Bushnell renewed her policy in 1988 and thereafter, Medico's hospital stay requirement can be and should be stricken from the policy as void against public policy. The trial court erred in upholding the hospital stay requirement. Mrs. Bushnell is entitled to coverage under her policy.

4. There Was No Lapse Under the Policy.

Medico also asserted that the policy lapsed as a basis for its denial of this claim.² There is no dispute that the claim arose during a period for which Medico agreed to provide coverage. Coverage was in force through February 28, 2007. Medico argued that because Medico received notice of the claim after February 28, there was no coverage under the policy. CP 166. There is no requirement that a claim be made by the end of the policy period. CP 30-34 In fact, the policy simply requires a claim be submitted within 20 days after the loss starts “or as soon as you can.” CP 33 Medico is attempting to re-write the terms of the policy and add a limitation on coverage that does not exist.

C. The Trial Court Erred in Denying Mrs. Bushnell’s Argument That the Hospital Stay Requirement Was Invalid.

The trial court should have found that the hospital stay requirement in Mrs. Bushnell’s policy was invalid and that she was entitled to coverage as a matter of law. The error arose from a substantive and procedural error in addressing these issues. On the eve of trial, the Trial Court improperly asserted an argument that Medico had not raised, and under the facts of the case, Medico was estopped from raising. Inserting such an argument on the eve of trial, and deciding it on summary judgment

² Though the trial court found in Mrs. Bushnell’s favor on this point, it is not reflected in the trial court’s order.

grounds, was procedurally defective and deprived Mrs. Bushnell with a reasonable opportunity to respond.

Relying upon *Tebb v. Continental Cas. Co.*, 71 Wn.2d 710, 430 P.2d 597 (1967), the trial court reasoned that Mrs. Bushnell's policy of insurance was a continuous contract. Such a finding cannot be made under the facts of this case, or without factual support in the record. The trial court erred in inserting an argument that is factually and legally defective.

1. Medico Did Not Assert That This Was a Continuous Contract.

There is no dispute in this case that insurance companies must conduct their relations with their insureds in good faith. RCW 48.01.030 provides that the business of insurance "is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters." *Coventry v. American States*, 136 Wn.2d 269, 276, (1998). Our legislature has enacted rules for fair claims settlement practices on several occasions, the most recent being the Insurance Fair Conduct Act, RCW, 48.30. More long standing requirements hold that an insurance company engages in unfair claims settlement practices when it misrepresents pertinent facts and fails to play claims without conducting a reasonable investigation,

(WAC 284-30-330), fails to disclose all relevant policy provisions, (WAC 284-30-350), and “fails to state the specific grounds for denial of a claim.” (WAC 284-30-380), *Coventry*, 136 Wn.2d at 276. It is well settled that if an insurance carrier denies coverage under the policy for one reason, while having knowledge of other grounds for denying coverage, it is estopped from later raising other grounds in an attempt to avoid the claim. *Moore v. National Accident Soc’y*, 38 Wash. 31, 80 P. 171 (1905); *D’Aquila Bros. Contracting Co. v. Hartford Accident & Indem. Co.*, 22 Misc.2d 733, 193 N.Y.S.2d 502 (1959), modified on other grounds, 15 App.Div.2d 509, 222 N.Y.S.2d 409 (1961); *Lancon v. Employers Nat’l Life Ins. Co.*, 424 S.W.2d 321 (Tex.Civ.App. 1968); *Middlebrook v. Banker’s Life & Cas. Co.*, 126 Vt. 432, 234 A.2d 346 (1967). *Bosko v. Pitts & Still, Inc.* 75 Wash.2d 856, 864, 454 P.2d 229, 234 (WASH 1969).

The rationale of such a rule is sound. An insurance company must fully disclose to an insured all relevant policy provisions and state the *specific grounds* for denial of a claim. The issue becomes one of fundamental fairness. As *Coventry* noted, “the insurance contract brings the insured a certain peace of mind that the insurer will deal with it fairly and justly when a claim is made. Conduct by the insurer which erodes the security purchased by the insured breaches the insurers duty to act in good

faith.” *Coventry*, 136 Wn.2d at 283. An insurance company must treat its insureds fairly, and the same rules apply in litigation.

Here, Medico did not assert as part of its denial of coverage that this was a continuous contract. In Medico’s response to inquiries by both the Washington Insurance Commissioner’s office and Bushnell’s counsel, Medico never asserted that this policy of insurance it sold to Bushnell was a continuous contract. In moving for summary judgment, Medico did not claim that the policy of insurance it sold to Bushnell was a continuous contract. In responding to Bushnell’s motion for summary judgment, Medico did not argue that this was a continuous contract. At no point in time has Medico raised the argument that the policy of insurance it sold to Bushnell constituted a continuous contract. Rather, the issue was raised by the Court. Having failed to assert that this was a continuous contract as a grounds for denying this claim, Medico cannot now be heard to argue that this was a continuous contract. *Bosko v. Pitts & Still, Inc.* 75 Wash.2d 856, 864, 454 P.2d 229, 234 (1969). The trial court erred in so holding.

2. A Continuous Contract Requires Evidence of Intent.

Whether the renewal of a policy constitutes a new and independent contract or a continuation of the original contract “depends upon the intention of the parties as ascertained from the instrument itself.” 2 Couch

on Insurance, §29.33. Where a contract provides that the original agreement “continues in force”, the courts have held the intent to form a continuous contract has been sufficiently shown. Conversely, where a policy clearly states that it terminates at the end of the policy period, a renewal is treated as a new policy. *Id.* Here, the policy states:

PART M POLICY PROVISIONS

(12) Term of Coverage: Your coverage starts on the Policy Date at 12 o'clock noon standard time where you live. It ends at 12 o'clock noon on the same standard time on the first renewal date. Each time you renew your policy, the new term begins when the old term ends.

The plain language of the policy demonstrates that coverage is for a defined term, and *ends* on the renewal date. Under the plain language of the policy, *new* coverage begins when the policy is renewed.

Here, the rules of insurance contract construction are again informative. Courts “liberally construe insurance policies to provide coverage wherever possible.” *Bordeaux*, 145 Wn.App. at 694, citing *Riley v. Viking Ins. Co. of Wisconsin*, 46 Wn.App. 828, 733 P.2d 556 (1987).

Any ambiguity “must be given a meaning and construction most favorable to the insured.” *Bordeaux*, 145 Wn.App. at 694, citing *Transcontinental Ins. Co. v. Wash. Pub. Utils. Dists' Util. Sys.*, 111 Wn.2d 452, 456-457, 760 P.2d 337 (1988). “Coverage exclusions ‘are contrary to the fundamental protective purpose of insurance and will not be extended

beyond their clear and unequivocal meaning. Exclusions should also be strictly construed against the insurer.” *Bordeaux*, 145 Wn.App at 694, citing *Stuart v. Am. States Ins. Co.*, 134 Wn.2d 814, 818-819, 953 P.2d 462 (1998).

Interpreting this contract as intending to create a continuous contract was clearly in error. No where do the parties indicate that this is a continuous contract. Rather, the policy states that “coverage ends” and a new policy term begins with each renewal. While it is clear that a new policy was intended by the language of the policy, at worst, the policy term demonstrates an ambiguity on the intent of the parties that cannot be resolved in Medico’s favor. The Court must adopt a construction that is favorable to the insured, Mrs. Bushnell. Here, the trial court adopted a construction that was more favorable to the insurer without support or justification. There is no basis for finding the parties intended to create a continuous contract, and no basis for the Court to resolve any ambiguity in favor of the insurance company.

D. The Trial Court Erred In Finding That Medico Did Not Commit an Unfair or Deceptive Act in the Sale and Marketing of a Long-Term Care Policy.

It bears noting that the statute prohibiting unfair or deceptive acts in the sale or marketing of long-term care policies, RCW 48.84.060, took

effect on November 1, 1986, before Mrs. Bushnell's policy was issued by Medico. Medico never informed Mrs. Bushnell that the policy required a three day hospital stay (whether that clause is valid or not), nor did Medico disclose to its applicants for long term care insurance how common or rare it would be to be hospitalized for the types of coverage it portended to provide coverage for. These are material omissions by Medico that the trial court improperly dismissed on summary judgment. The gravamen of Mrs. Bushnell's argument that Medico's sale of this policy was misleading and deceptive does not hinge upon whether or not this policy is deemed a continuous contract. Here, the trial court improperly resolved Mrs. Bushnell's claims concerning the false and misleading marketing and sale of this policy. CP 370-373. Medico was advertising "long-term convalescent care", yet the trigger to coverage under the policy, a hospital stay, contained a hidden exception to coverage that would make coverage largely illusory. When a person suffers a stroke and requires convalescent care, they are sent to a convalescent care facility, not a hospital. By failing to disclose all material facts, Medico is creating a false sense of coverage under the policy where little coverage might otherwise exist. It was for a jury to decide if Medico's actions were false and misleading, and the trial court improperly resolved these issues.

A legal holding that this policy was a continuous contract creates additional grounds for asserting that Medico violated RCW 48.84.060. By holding that this is a continuous contract, the Court is finding that Mrs. Bushnell is not entitled to enhancements of coverage over time, a holding that directly contradicts statements made by Medico in the sale and marketing of this policy. Medico said this policy gets better with age (CP391) and is more valuable as health care costs rise (CP 393). Medico failed to disclose to its insured that a continuous contract was intended, and failure to disclose this material fact to an insured constitutes a false and misleading statement in the sale and advertising of long-term care policies. Mrs. Bushnell's claims should not have been dismissed, as there is no evidence offered by Medico on what it did or did not disclose to its insured.

E. The Trial Court Erred in Finding that Medico Acted Reasonably in Denying this Claim.

The Trial Court's finding that the long-term care act did not apply to the policy of insurance sold to Mrs. Bushnell effectively rendered Mrs. Bushnell's remaining claims moot. Mrs. Bushnell argued that Medico acted in bad faith when it failed to conduct a reasonable investigation into whether Medico's policy was amended by operation of law to eliminate the hospital stay requirement. Finding that the hospital stay requirement

was valid, the Court implicitly found that Medico fulfilled its obligations to Mrs. Bushnell by looking at the policy. Under the reasoning adopted by the trial court, Medico was not obligated to research or determine whether the Medico policy had been amended by operation of law (as requested by Mrs. Bushnell) since under the Court's ruling, it had not been amended. Claims that Medico's examination of the policy (and not Washington law) constituted an inadequate investigation into the claim were dismissed.

Whether an insurance company acted reasonably is a question of fact. *Industrial Indemnity Co. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990) (reasonableness of insurance company's actions must be viewed in light of all the facts and circumstances of the case.) Here, Mrs. Bushnell called into question the reasonableness of Medico's disclosures and practices surrounding the sale of the policy, and the reasonableness of Medico's investigation into Mrs. Bushnell's assertion that the hospital stay requirement had been eliminated from her policy by operation of law. Medico has offered no evidence from which the Court can conclude that it made no misrepresentations in the marketing and sale of this policy. The trial Court erred in dismissing these claims.

The trial court also erred in dismissing Mrs. Bushnell's claims that Medico failed to conduct a reasonable investigation. Again, Kimberly Jackson of Medico denied this claim by looking at the policy. While an

insurer should look at the policy to determine coverage, Medico made no attempt to determine whether the hospital stay requirement remained valid under Washington law. Though insurers may find it harsh to require them to examine whether their policies comply with existing laws, it bears repeating that counsel for petitioner asked Medico to revisit its coverage determination in light of Washington law. Medico did not examine the applicability of the long-term care statute, simply concluding that it did not apply since the effective date of certain provisions of the act post date the issuance of the policy. Medico does not then examine the common law, or other legal authority which would cover this contract, but responds by stating ‘the policy complied with Washington law when it was issued.’ This is a non-sequitur response to the request of its insured. The trial court erred in dismissing Mrs. Bushnell’s claims over the insufficient investigation into her claim.

F. The Trial Court Erred in Denying Mrs. Bushnell Her Reasonable Attorneys Fees and Costs.

Having found that Mrs. Bushnell was not entitled to coverage, the Court also denied Mrs. Bushnell’s’ request for reasonable attorneys fees under RCW 48.30.015 and *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), the Consumer Protection Act, and bad faith case law. If Mrs. Bushnell prevails on her

coverage arguments, the trial court has erred in refusing to grant her her reasonable attorneys fees and costs under *Olympic Steamship* and all relevant authority. Issues of fact on the reasonableness of Medico's investigation and conduct preclude the trial court from denying Mrs. Bushnell her right to recover damages, attorneys fees, and costs, for Medico's bad faith conduct. Mrs. Bushnell is entitled to recover her damages for bad faith.

G. Mrs. Bushnell, as the Prevailing Party on Appeal, is Entitled to Her Reasonable Attorneys Fees.

If Mrs. Bushnell is successful in this appeal, she also entitled to attorneys fees under *Olympic Steamship* and case law. If successful on this appeal, a properly documented request for reasonable fees will be submitted at the conclusion of the appeal.

VI. CONCLUSION

In short, Washington law prohibits an insurance company from conditioning long-term care coverage on a three day hospital stay requirement, and has done so since 1988. In 2007, Medico denied Mrs. Bushnell's claims for long-term care coverage, citing a hospital stay requirement in the policy. By operation of law, the three day hospital stay requirement would have been eliminated from Mrs. Bushnell's policy when she renewed it after the effective date of the act. To hold otherwise

would be to hold that Medico has been selling long-term care insurance to Mrs. Bushnell in the state of Washington that does not comply with Washington law, a violation of RCW 48.18.130.

The trial court went astray in this case by injecting an argument that was not raised by Medico, and that Medico is estopped from asserting. Doing so, the trial court improperly resolved issues of fact, and interpreted exclusionary language in an insurance policy in favor of an insurer. The trial court erred in resolving these claims on summary judgment.

Dated this October 5, 2009

Respectfully submitted,

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ORIGINAL

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

LEROY BUSHNELL, as personal
representative of the Estate of EVELYN
BUSHNELL,

Plaintiff/Appellant,

v.

MEDICO INSURANCE COMPANY, a
Nebraska Corporation, and MEDICO LIFE
INSURANCE COMPANY, a Nebraska
Corporation,

Defendants/Appellees.

No. 63916-1-I

PROOF OF SERVICE

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I, Jessica Monsanto, paralegal for BADGLEY~MULLINS LAW GROUP, attorneys for Plaintiff/Appellant in the above entitled action, hereby certify that I am over the age of eighteen (18), and am competent to testify to the facts contained herein. On the 5th day of October, 2009, I served by legal messenger the following documents:

1. Brief of Appellant ; and
2. Proof of Service

Upon the attorney of record herein, as follows, to wit:

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DATED this 5th day of October, 2009 in Seattle, WA.



Jessica Monsanto
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