

64233-2

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No. 64233-2-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

KIMBERLY J. WRIGHT,
Appellants,
v.

PEMCO MUTUAL INSURANCE COMPANY
Respondents.

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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

WRIGHT'S REPLY TO PEMCO'S RESPONSE

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ORIGINAL

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A. INTRODUCTION

The lower court did not file Findings of Fact and Conclusions of Law explaining the superior court Order on Summary Judgment. There was no recording of proceedings. It is abuse of discretion for the lower court not to provide a record of fact and law explaining the basis of its summary judgment. PEMCO's argument defending the lower courts findings in the PEMCO Response is conjecture.

Wright petitions this Court to find that there were material changes sufficient changes in her auto insurance to require a new UIM waiver. Alternately that the waiver she signed was not a knowing waiver and is void or the matter should be remanded for trial on the merits. Wright also petitions the court for a finding of bad faith sufficient to remand for trial on the merits.

Wright also asks this court to address the application of the *Johnson v. Farmers Ins. Co. of Washington*, 117 Wash.2d 558, (1991). "materiality" test held to be the determining factor in deciding if a change in a policy created a "new policy" per RCW 48.22.030. Especially in light of the apparent disparate decisions in other jurisdictions. And the perceived lack of plain meaning statutory interpretation This matter was the issue on direct appeal and Wright understands the limitations of jurisdiction in this Court.

RCW 48.22.030 is public policy generated statute requiring insurers to offer uninsured motorist coverage to all insurers. The statute has changed little since 1980.

B. BAD FAITH

Ms. Wright argues PEMCO acted in bad faith (CP 66-69) and the lower court erred when all bad faith claims were summarily denied without comment. There are genuine issues of material fact whether or not (1) PEMCO's failure of its legal duty to provide Ms. Wright's a copy of the PEMCO policy is bad faith (CP 353); whether or not the (2) argument that PEMCO breached a duty to provide Wright enough information to give her the adequate knowledge for a valid waiver (CP 69-72) and whether (3) there are material issues of fact in the construction of the waiver and concerning Wright's understanding of the terms of that waiver because PEMCO did not provide Wright with a policy or explanation of insurance coverage terms. PEMCO provided no documents or testimony recounting conversation or dialogue between PEMCO and Wright.

1. PEMCO's Bad Faith Failure To Deliver A Policy To Wright

a) PEMCO Response Brief (herein after cited as PRB) in error at p. 20-22.

The statute legally mandating that PEMCO deliver a copy of the

whole policy to the insured is RCW 48.18.260 and it is codified in WAC 284-39-580 Office of Insurance Commissioner, Trade Practices.

PEMCO interprets RCW 48.18.260 and WAC 284-39-580 to find bad faith against the insurer only if the insurer's agent holds and doesn't deliver a copy of the PEMCO policy to Wright. This interpretation does not seem tenable in light of the plain language of both laws.

b) The Plain Meaning Analysis of RCW 48.18.260 and WAC 284-30-580.

(1) RCW 48.18.260 Delivery of Policy

“. . . every policy **shall be delivered to the insured** or to the person entitled thereto within a reasonable period of time after its issuance. RCW 48.18.260(1)(emphasis added). This statute applies to all automobile insurance. RCW 48.18.010.

(2) WAC 284-30-580. Policies to be delivered, not held by agents.

A plain reading does not limit this code to agents failing to deliver a policy to the insureds. WAC 284-30-580 incorporates the RCW 48.18.260 duty of insurers to deliver a policy by restating the first sentence of the statute (supra) in the first complete sentence of the WAC. **“RCW 48.18.260 requires that policies be delivered within a reasonable period of time after issuance.”** WAC 284-30-580(1)(emphasis added). This WAC begins by restating the duty of

insurers to deliver policies to insureds pursuant to RCW 48.18.260 in a sentence ending with a period. The second full sentence includes agents: “**If** an insurer relies upon its agents to make deliveries . . . the insurer, as well as the agent, is responsible . . .” *Id*(emphasis added).

PEMCO’s interprets the code to mean that only **when an agent fails to deliver a policy** is the insurer liable for bad faith. PRB at 20. This cannot be the meaning of statute and the WAC taken as a whole. The primary duty to deliver the policy resides with the insurer.

The plain meaning appears self evident: “[i]t shall be an unfair practice and unfair competition for an **insurer or agent** to engage in acts or practices which are **contrary to or not in conformity with** the requirements of **this section . . .**” WAC 284-30-580(4). PEMCO’s failure to deliver to Wright a copy of the policy is contrary to, and not in conformity with, the statute or the administrative law referencing the statute.

PEMCO’s failure to deliver a policy to Wright is a prima facie claim of bad faith that should not have been denied at summary judgment.

2. Material Facts To The Insufficiency Of The UIM Waiver

a) Misunderstanding and mistake due to lack of policy

Wright’s affidavit is evidence that she was misinformed and not knowledgeable of the meaning of essential terms of the UIM waiver:

“[t]o my understanding . . . Bodily Injury means just that. If I was injured in an accident . . . Bodily Injury coverage . . . would be covering my personal bodily injuries, not UIM . . .” (CP 74). Wright’s misunderstanding of Bodily Injury, taken in the light most favorable to her must be attributed, in part, to PEMCO’s failure to obey the laws that required them to provide Wright a copy of the PEMCO policy.

The definitions in the PEMCO policy could have clarified terms art of in insurance contracting for Wright: “COVERAGE A-BODILY INJURY LIABILITY . . . [PEMCO] will pay the damages of bodily injury **to others** if you . . . are legally responsible . . .” CP 291(emphasis added). The PEMCO policy that Wright should have been provided has three pages of small font explaining Bodily Injury and UIM coverage and explaining who would benefit from each and under what conditions.

Taking evidence in the light most favorable to the non-moving party, the undisputed fact that PEMCO never provided Wright a copy of the policy creates a material issue of fact whether Wright had sufficient knowledge to make a knowing wavier. Whether PEMCO acted in bad faith is a question of fact. *Smith v. Safeco*, 150 Wash.2d 478, 484, 78 P.3d 1274 (2003).

PEMCO cites *Smith* for the proposition that summary judgment is appropriate in a bad faith case (PRB at 19):

. . . if there are no disputed material facts pertaining to the reasonableness of the insurer's conduct under the circumstances, or the insurance company is entitled to prevail as a matter of law on the facts construed most favorably to the nonmoving party.

Smith at 484.

However, *Smith* offers further clarification:

. . . reasonable minds could differ that the insurer's conduct was reasonable, or if there are material issues of fact with respect to the reasonableness of the insurer's action, then summary judgment is not appropriate . . . If the insurer can point to a reasonable basis for its action, this reasonable basis is significant evidence that it did not act in bad faith and may even establish that reasonable minds could not differ . . . **However, the existence of some theoretical reasonable basis for the insurer's conduct does not end the inquiry.**

Smith at 486 (emphasis added).

Wright argues that PEMCO acted unreasonably when they failed to provide her copy of the PEMCO policy but at the same time held Wright responsible for that definitions she could have only found in the policy when she signed a UIM waiver.

The PEMCO policy is incorporated in the UIM waiver Wright signed by reference. CP 178. The PEMCO policy, never delivered to Wright, states in part: “[t]his policy is a legal contract that must be read and applied as a whole . . . [t]his contract, the “Declarations,” and any attached endorsements contain all the agreements between you and [Pemco].” CP 274.

b) Ambiguities in the waiver form are magnified because PEMCO did not deliver a policy to Wright and that made the misleading construction in the UIM waiver form even worse.

(1) PEMCO's statement that "Wright's argument on this issue is vague" appears to not consider Wright's arguments.

PEMCO did not respond to any of Wright's argument on specific ambiguities and contradictions in the UIM waiver presented in Wright's Opening Brief, p.34 and Appendix 2. p. 43. Uncontroverted they must stand.

Appendix 2, a verbatim copy of the original waiver form, (WOB at p. 43) was incorporated by reference in Wright's Opening Brief at page 34 and presented in order to make the text of the waiver more readable than the dark copies of the original. The ambiguities and contradictions were footnoted to more easily address arguments to the specific words and phrases of concern. Appendix 2. WOB at 43.

The line at the end of the second paragraph of the waiver, "we may change this limit only with your written consent" refers to all the antecedent coverages named in the second paragraph: i.e. "Underinsured Motorist Bodily Injury", "Bodily Injury Liability" and "UIM Property Damage". WOB at 43. This statement is **not** true. Written consent is **not**

required to change “Bodily Injury Liability” and “UIM Property Damage.”

The PEMCO UIM waiver form does not distinguish between “Underinsured Motorist-Bodily Injury Coverage” and “Bodily Injury Liability.” The declarations pages and insurance statements do not explain the difference. CP 34-53. Wright’s belief, though erroneous, was that she didn’t need UIM because she was already covered for injury under Bodily Injury Liability. CP 74. Wright belief, though erroneous, is reasonable as sworn in her affidavit: “Bodily Injury means just that. If I was to be injured in an accident that it was Bodily Injury coverage that would be covering my personal body injury, no UIM, which is why I didn’t think anything was wrong. It’s up to the person I am speaking with to explain everything to me . . . I was not given full information.” CP 74 at #9. Bodily Injury Liability is not explained by any of documents PEMCO provided her. CP 173 -195.

(2) PEMCO wrongly claims that the words in the fifth paragraph of the waiver over Wright’s signature prove she made a knowing waiver.

Wright’s signature on the waiver form does not impute knowledge. The signature creates a rebuttable presumption she knew what she was signing.

PEMCO argues the Wright's signature under the words in the waiver are proof that Wright had all her questions answered:

Underinsured Motorist-Bodily Injury and Underinsured Motorist-Property Damage Coverages have been explained to me. I understand the coverages and request that my policy be changed for this policy period and all subsequent renewals in accordance with the option(s) I have selected below.

PRB at p. 17 (citing CP 38).

This is an accurate quote from the UIM waiver form, but this statement addresses only two types of coverage: (1) UIM Underinsured Motorist-Bodily Injury and (2) Underinsured Motorist-Property Damage. CP 38 and CP 178. This statement does not address Bodily Injury Liability. Wright did not sign that she understood "Bodily Injury Liability." However, Bodily Injury Liability is referenced on the waiver form in the second paragraph: "Underinsured Motorist-Bodily Injury Coverage is initially provided in an amount equal to your **Bodily Injury Liability Coverage**". WOB at 43. The form does not direct her "not to sign" if she does not understand "Bodily Injury Liability."

The waiver form directs Wright to inquire if she does not understand the type of coverage she is waiving: "[t]he options below are available to you. If you have any **questions about either coverage**, do not sign this form." CP 178 and WOB at 43 (emphasis added).

There is a short explanation Underinsured Motorist coverage in the form but no explanation at all of what Bodily Injury Liability coverage encompasses. These are insurance terms of art; if they are not explained or the definitions made available then the average person can easily be mistaken.

PEMCO failed to provide Wright with the necessary information to understand the consequences to her injury protection by waiving UIM coverage. Because the PEMCO policy was not provided to her and she did not know what she did not understand.

PEMCO's argument that: "Wright can hardly complain that she did not understand what she was waiving" (PRB at p. 17) narrowly focuses on Wright understanding the UIM coverage but not the consequences of not understanding the other coverage referenced in the waiver. An understanding of Bodily Injury Liability is necessary to understand the implications of waiving UIM coverage.

Interpretation of insurance policies is a question of law and the policy language is interpreted as it would be understood by the average person, rather than technically. Ambiguities, if any, exist if the language is susceptible to two reasonable interpretations. If the court cannot resolve any ambiguity by resort to extrinsic evidence, then the ambiguity in an insurance policy is construed in favor of an insured. *Van Noy v. State*

Farm Mut. Auto. Ins. Co., 98 Wn.App. 487, 492; 983 P.2d 1129 (1999).

PEMCO's emphasis on Wright's signature does not address the fact that Wright's affidavit proves that she did not understand Bodily Injury Liability coverage. Wright's understanding (though erroneous) was that a waiver of UIM coverage would not effect \$100,000 for injury to her or her passengers. CP 74. With Bodily Injury coverage listed on the declarations pages at \$100,000 (CP 46) she believed that UIM was redundant coverage and that a reduction would not effect her coverage for injury to herself.

There is no evidence that Bodily Injury Liability was ever explained to Mrs. Wright. **"I can tell you nobody remembers talking to Kimberly Wright."** CP 143 (emphasis added). Wright's signature does not create a finding as a matter of law that she understood Bodily Injury Liability.

PEMCO acknowledges that Wright never received the policy that contained the definitions cited above: **"Wright's claim that she never received a copy of the policy must be taken as true"**. PRB at 20 (emphasis added).

Wright never had the contract to consider in signing the UIM waiver. *Johnson* holds that "parties contract with UIM insurers to provide an additional layer of compensation; the contractual relationship between

the insurer and the insured must be considered.” *Johnson* at 566. PEMCO’s negligence is implicated in Wright’s misunderstanding of the PEMCO contract terms therefore Wright’s waiver should be void as a matter of law.

(3) PEMCO profited by restricting UIM coverage.

PEMCO argues without evidence that “[t]here Is No Evidence that Pemco [sic] Placed Its Interests Above Wright's Interests.” PRB at 26. PEMCO supplied the documents that Wright presented showing greater losses in UIM claims coverage than in other coverages and PEMCO explained them in their response to interrogatories at CP 307 through CP 309. In response to the following interrogatory asking PEMCO if they had answered with all that is available to answer the discovery requests, they answered; “Yes”, subject to relevance and admissibility objections. CP 310.

PEMCO requested that Wright not publish this information because of trade secret concerns but they finally agreed to allow the information to be supplemented to the record after the summary judgment motion. CP 345. Now PEMCO asserts the numbers are meaningless.

The fact remains that Wright has made the assertion and submitted the evidence provided by PEMCO that was claimed to be full disclosure of the subject. The uncontroverted evidence provided by PEMCO in discovery from the chart and numbers in the interrogatories showing

PEMCO was losing money on UIM premiums in 2003 must stand. PEMCO has offered nothing to rebut Wright's assertion and nor the evidence submitted. PEMCO makes unsubstantiated claims that the numbers they provided in discovery showing PEMCO losing money on UIM coverage in 2003 at the time Wright added her second car are now somehow meaningless.

When PEMCO was asked under oath who at PEMCO would know if they were making money on their UIM premiums, the reply was: "Well that information is available internally to all departments." CP 147.

There is a prima facie showing that by not giving Wright the opportunity to increase her UIM limits when she added her second car in 2003 that PEMCO was placing their interests above the interests of the Wright. PEMCO's duty of good faith rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholders: an insurer must deal fairly with an insured, giving equal consideration *in all matters* to the insured's interests. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wash.2d 784, 794; 16 P.3d 574 (2001).

3. Application of WAC 284-30-350 to Wright's UIM claim.

PEMCO correctly identifies Wright's claim that PEMCO's failure to deliver the insurance policy when the policy is first issued violates WAC 284-30-350.

a) **UIM claim is subject to unfair claims settlement practices**

Wright's claim focuses on two sections of WAC 284-30-350:

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

2. No agent shall conceal from first party claimants benefits, coverages or **other provisions of any insurance policy** or **insurance contract** when such benefits, coverages or other provisions are pertinent to a claim.

WAC 284-30-350

(1) Wright contends that PEMCO unfairly effected her settlement claims by not providing the policy.

Wright contends that part 1. of WAC 284-30-350 (supra) is not necessarily limited to after a claim is made. When PEMCO failed it's legal obligation to provide the policy it prospectively and foreseeably impacted Wright's future claim, now subject of this action. This is an unfair practice on it's face that seriously impacted Wright's UIM claim.

PEMCO's negligence in not providing the policy contributed to the misinformed UIM waiver that PEMCO now holds up as valid to reduce Wright's injury coverage.

(2) WAC 284-30-350 and foreseeable injury to future claims.

PEMCO's unfair practices that foreseeably impacted Wright's claim are not specifically barred under part 1 of WAC 284-30-350. The purpose

of insurance is to protect against loss, and claims are foreseeable and at issue at all times in negotiating the contract.

Part 2. (supra) of WAC 284-30-350 contains the language “when such benefits are pertinent to the claim.” This seems to reflect the legislative intent that this part applies after the claim. The absence of this language in part (1) argues that the legislature intended that a prospective claim is not barred from protection here.

Wright argues this unfair claims statute applies to PEMCO’s actions that directly impacted her UIM claim.

C. RCW 48.22.030 NEW POLICY

1. A New Policy Created by Law pursuant to RCW 48.22.030 Requiring PEMCO to have Wright Sign a New UIM Waiver.

a) Johnson materiality test applied to UIM statute.

In applying the materiality test the *Johnson* court made no restriction nor did it differentiate between types of changes in coverage to find a “new policy” under the materiality test.

The only part that *Johnson* incorporated in their holding from looking at foreign jurisdictions was 1) the “materiality test” and 2) that a **replacement** vehicle was consistent with a renewal of policy.

Importantly *Johnson* put most emphasis on the fact that “[t]here were no changes made in coverage, and where coverage levels remain

constant, the majority of jurisdictions support the conclusion that no new policy is created. *Id* at 572. The *Johnson* Court does not limit the type of coverage changes that would constitute a “material” change.

b) Material changes can include adding a vehicle.

Wright argues that the addition of a new vehicle to create a two vehicle policy, along with adding Collision and Comprehensive for the new car and not the older car that more tripled her premiums created a material change creating by law a new policy considering all the factors in terms of “material change” under contract analysis.

The UIM statute is to be liberally construed in order to provide broad protection against financially irresponsible motorists. The public policy of protecting the innocent victim of an uninsured motorist is applied to the underinsured motorist statute to the extent that it is compatible. *Clements v. Travelers Indem. Co.* 121 Wash.2d 243, 251-252 850 P.2d 1298 (1993).

c). The difference of a vehicle “replaced” as opposed to a vehicle “added.”

When a vehicle is added the insured now has two or more vehicles on the road; liability and UIM claim exposure doubles. The insurer has greater liability exposure from two cars instead of one and has significantly greater financial obligation created on the insured.

Replacing a vehicle the insurers exposure is not increased significantly unless the replacement vehicle has greater value or liability. Replacing a vehicle is more consistent with “renewal” of policy because insurer’s exposure and aggregate coverage changes little if at all.

2. Wright argues *Johnson*, *Torgerson*, *Jochim* all involved replacement vehicles and do not rule on adding vehicles.

PEMCO argues that Wright argues this for the first time on appeal and it should not be considered. PRB at p.5 This is not a new argument. Wright states in her lower court response to summary judgment that one of the issues in *Johnson* is the “(1) **replacement** of the auto insured”. CP 60 (emphasis added) and that “the Torgersons **replaced** their older vehicle with a newer vehicle.” CP 64 (emphasis added).

PEMCO argued in the last reply at the lower court that: “[t]he plaintiff cannot deny the rule established in *Johnson* . . . that **the addition of a new vehicle . . . does not create a new policy.**” CP 323 (emphasis added). PEMCO should not be surprised that Wright argues the distinction between **addition** as opposed to **replacement** of a vehicle in Wright’s policy and in any case relevant law cited.

D. JOHNSON IS GOOD LAW AND JOCHIM IS FLAWED

1. PEMCO Relies Heavily on *Jochim* for Two Arguments.

The first is that *Jochim*'s bright line rule is flawed. *Jochim v. State Farm Mut. Auto. Ins. Co.*, 90 Wash.App. 408 holds that there must be a change in Bodily Injury Limits before the change implicates a new waiver pursuant to RCW 48.22.030. The second is *Jochim* holds that changes in collision and comprehensive coverage have no bearing the issue of a new policy at all. The first argument bootstraps the second. This holding effectively eviscerates the materiality test in *Johnson*.

a) *Jochim* relies heavily on cases out of Louisiana.

Louisiana is the source of the bright line rule that there can be no new policy unless there is change in Bodily Injury Coverage. This is an attractive argument because the statute ties UIM coverage to Bodily Injury coverage.

b) The *Jochim* rule has two major flaws.

(1) First, the Louisiana courts following their state UIM statute.

The state statute prohibits a new UIM waiver unless the Bodily Injury coverage limits changed: “*changes to an existing policy, regardless of whether these changes create new coverages, except changes in the limits of liability, do not create a new policy . . . [or] new uninsured motorist . . . form.*” Louisiana Code, RS 22:1406 (D), CP 382.

(2) Second, *Jochim* narrows the *Johnson* materiality test.

Jochim restricts materiality to be dependant on changes in Bodily

Injury coverage limits. This decision was adopted by PEMCO and probably other insurers as the *sine qua non* of when agents were to offer their insured a new UIM waiver. CP 245 at the bottom.

PEMCO amalgamates the dicta and holdings and argues that: “*Johnson, Jochim and Torgersen* all establish that the **only** “material” changes to an existing policy that can create a new policy are changes to liability limits or UIM limits.” PRB at 9 (emphasis added).

2. PEMCO errors in Washington case interpretation

a) PEMCO interprets that “Washington cases are clear that adding a new vehicle to an existing policy does not create a new policy for purpose of a UIM waiver.” Citing *Johnson* as controlling on this issue. PRB at p.5.

This not true, *Johnson’s* factual determination was about a replacement vehicle.

Wright found no UIM waiver cases in Washington where the facts in the case involved add a second vehicle to policy in a UIM waiver dispute case. There is no such fact addressed in the *Johnson* case. “Barbara [Johnson] traded in the 1977 Thunderbird and bought a 1985 Toyota Corolla in August 1985.” *Johnson* at 563. This is a “replacement” vehicle.

b) PEMCO claims that the “[Johnson] court ruled that no new

UIM waiver was required even though a **new vehicle had been added** to the policy. PRB at p.6 Citing *Johnson* at 573-574

PEMCO misstates the holding and ruling in *Johnson* by mixing terms. The correct cite is: “[t]he **replacement** of the covered automobile in an existing policy does not amount to the creation of a new policy under RCW 48.22.030.” *Johnson* at 673-574 (emphasis added).

c) Plain meaning in statutory interpretation.

The goal in construing a statute is to give effect to legislative intent, to determine legislative intent, to review the disputed statutory language within the context of the statute as a whole. Absent ambiguity or a statutory definition, the words in a statute are given their common and ordinary meaning. The court may look to the dictionary to ascertain the common meaning of undefined terms. The court should avoid [s]trained, unlikely or unrealistic interpretations. *Lacey Nursing Center, Inc. v. State, Dept. of Revenue*, 103 Wash.App. 169, 175 11 P.3d 839 (2000)(citations omitted).

No court has looked to define the other relevant terms, “renewal” and “supplemental,” in the statute using the plain meaning approach.

If it is not a “renewal” policy or a “supplemental” policy then the focus is towards looking for materiality creating a new policy. Renewal is already defined in under the Title 48 the same Title as the UIM statute:

“Renewal” or “to renew” means the issuance and delivery by an insurer of a contract of insurance replacing at the end of the contract period a contract of insurance previously issued and delivered by the same insurer, or the issuance and delivery of a certificate or notice extending the term of a contract beyond its policy period or term.

RCW 48.18.2901(4)

E. PEMCO’s Dispositive Arguments

1) PEMCO Claims Statute of Limitation Defense

PEMCO correctly points out that the statute of limitations for a bad faith claim is three years. RCW 4.16.080(2). The statute of limitations for the Consumer Protection Act is four years. RCW 19.86.120.

a) PEMCO claims the statute of limitations has run on Wright’s bad faith and CPA claims.

PEMCO argues, without evidence, that because the failure to deliver a copy of its policy occurred probably in 1994 that both statutes have run on Wright’s claims for Bad Faith and Consumer Protection Act violation.

(1) PEMCO’s argument is waived

PEMCO did not raise any statute of limitation affirmative defenses in their answer (CP 9) and did not raise any in the Motion of Summary Judgment (CP 13) nor in PEMCO’s summary judgment reply. PEMCO first argued that Wright failed to state harm for which relief can be granted and violations of statutes of limitation defenses in the PEMCO response to

Wright's motion to reconsider. CP 357. The lower court denied Wright's motion to reconsider without comment. CP 371.

Civil Rule CR 8(c) requires responsive pleadings to set forth "any ... matter constituting an avoidance or affirmative defense," including statutes of limitation. Affirmative defenses are thus waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b) tried by the parties' express or implied consent. *Harting v. Barton*, 101 Wn.App. 954, 962, 6 P.3d 91 (2000).

(2) The Statute of Limitations has not run.

PEMCO failed to deliver a policy to Wright requires pursuant to RCW 48.18.360. The statute requires PEMCO to deliver the policy in reasonable time after issuance but the violated statute does not provide a date certain. RCW 48.18.360. PEMCO could have cured the defect at any time up until Wright made a claim for UIM coverage.

The bad faith claim sounds in tort but since it is derived from a contract the clock did not begin until PEMCO denied Wright's UIM claim. Similarly the CPA statute clock begins when the claim accrues. RCW 19.86.120.

The claims by PEMCO for statute of limitations violations lack timeliness and substance. Wright asks this Court to deny these dispositive claims.

b) PEMCO claims Wright did not allege harm PRB at 22.

(1) Wright alleged harm in her complaint.

PEMCO is mistaken. Wright's allegation is clear in her complaint. The pertinent part is from paragraph 4.4 alleging bad faith and Consumer Protection Act violations that is incorporated in section 5. Injuries and Damages, which states at 5.2 in part that "defendant's limited UM/UIM coverage underinsured [Wright] in the amount of \$50,000. Defendant's conduct described above has caused plaintiff unnecessary financial difficulties and stress resulting in worsened mental conditions. Defendant's lack of good faith has caused [Wright] to incur additional fees and costs, including . . . attorney fees and consequential damages." CP 4-5.

(2) PEMCO delayed raising the claim of lack of harm

PEMCO did not raise the issue of lack of harm in their answer. PEMCO first raised the claim in their response to Wright's motion for reconsideration, the same pleading PEMCO brought up the claim that the statutes had run. CP 361. Again the lower court did not address this claim in denying Wright's motion to reconsider.

F. SUMMARY AND CONCLUSION.

Wright was perhaps an exception to the rule for PEMCO, but she did not get the service she deserved. She did not get the policy or the

help that may have made a policy unnecessary. PEMCO has violated the law in not providing a policy. They are not concerned. If they were there would keep records of sending out policies.

Wright in the plain meaning of the statute and materiality in contract established a new contract by adding a car and making a two car policy and adding coverage that was not there and not on the other car and by increasing the premium she had to pay by almost three fold.

There is a genuine issue of fact as to whether or not Wright made a knowing waive of her UIM coverage. PEMCO's violation of the fair claims act is a fist impression approach, but negligent bad faith is evident here.

Wright petitions this court for finding as a matter of law that there was a new policy when she added her second car in 2003 that required a new UIM waiver and Wright petitions the court for attorney fees and costs as preyed for in the opening brief.

Dated this 16 day of November 2009

Presented by:
POTTER-SYBOR, PLLC
Attorneys for Plaintiff,


Dennis L. Potter, WSBA 27091

No. 64233-2-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

KIMBERLY J. WRIGHT,
Appellants,
v.

PEMCO MUTUAL INSURANCE COMPANY
Respondents.

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CERTIFICATION OF SERVICE

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ORIGINAL

CERTIFICATION OF SERVICE

The undersigned declares as follows:

The parties have agreed to service by email pursuant to the Supreme Court of Washington Order No. 25700-B-334 entered September 4, 1997. The following documents were served by email and US MAIL on November 16, 2009:

1. APPELLANT WRIGHT'S REPLY TO PEMCO
2. Certification of Service

To the following counsel of record:

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

DATED and SIGNED this 16th day of November 2009 in Seattle, Washington.


Dennis L. Potter, WSBA 27091,
Attorney for Kimberly Wright.

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STATE OF WASHINGTON