

NO. 66755-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

OREGON MUTUAL INSURANCE COMPANY, an Oregon corporation,

Appellant

v.

HARTFORD FIRE INSURANCE COMPANY,

Respondent

REPLY BRIEF OF APPELLANT

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Despite its lengthy history, at the heart of this case the issues are clear-cut and can be decided under the undisputed facts and existing law:

1. Did Hartford breach a duty to defend Wellman in the *Buchholz* and *State Farm* suits?

Answer: Yes. The underlying complaints alleged claims conceivably covered under Hartford's policy and the allegations did not "clearly" fall outside of the policy. Hartford was therefore required to defend Wellman and breached that duty when it refused. *E.g., Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760-61, 58 P.3d 276 (2002).

2. Did Hartford refuse to defend Wellman in bad faith?

Answer: Yes. Hartford's refusal to defend Wellman was unreasonable, frivolous and/or unfounded because, *inter alia*, Hartford refused to defend by ignoring express allegations of "severe and significant water damage," by assuming unalleged facts, and by relying on inapplicable exclusions. *VanPort*, at 763-64.

3. Is Hartford estopped to deny coverage?

Answer: Yes. When an insurer refuses to defend in bad faith, harm is presumed and the insurer is estopped to

deny coverage. See, e.g., *VanPort*, at 765-66; *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 390-91, 823 P.2d 499 (1992). Hartford must therefore pay all sums for defending and settling the underlying suits.

4. Did Hartford violate the Consumer Protection Act?

Answer: Yes. Hartford violated the CPA and damaged Wellman by denying a defense in bad faith.

5. Was Hartford negligent?

Answer: Yes, because Hartford acted unreasonably in denying Wellman's tenders and proximately caused damage to Wellman.

6. Should Hartford pay Oregon Mutual's fees and costs?

Answer: Yes. Oregon Mutual (as Wellman's assignee) was compelled to sue in order to obtain coverage under Hartford's policy. *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53-54, 811 P.2d 673 (1991). Oregon Mutual is thus entitled to its fees and costs in the trial court and also in this appeal under RAP 18.1.

Oregon Mutual respectfully asks this Court reverse the trial court and to find for Oregon Mutual on these issues.¹

A. Hartford Breached Its Duty To Defend.

This threshold issue is easily answered because the *Buchholz* and *State Farm* complaints undeniably triggered Hartford's duty to defend. The *Buchholz* complaint alleged that Wellman's defective construction resulted in "severe and significant water damage" to the condominiums and common spaces. CP 1707-08 at ¶¶ 1.12, 1.13. The complaint described problems with specific work on the project and with other work "yet to be discovered." CP 1708-09 ¶ 1.15(a)-(i); CP 1711-12 ¶ 2.6(a)-(i); CP 1713-14. The complaint did not state when the work was done or when any of the "severe and significant water damage" occurred. See CP 1705-14. Similarly, the *State Farm* complaint alleged "substantial defects in the work," and also stated that State Farm's claims arose out of the *Buchholz* lawsuit. CP 1729 at ¶¶ 3.2 – 3.3.

Both of these complaints triggered Hartford's duty to defend because, liberally construed, they "conceivably" alleged accidental property damage, and they did not "clearly" rule out the possibility that Otis's elevator work could have caused or contributed to the property

¹ Contrary to Hartford's argument, Oregon Mutual did argue its contribution claim to the court below. See CP 0814-15. Oregon Mutual incorporates that argument and the argument in its opening brief here.

damage at issue. See, e.g., *VanPort, supra*; *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000); *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 881, 91 P3d 897 (2004). Because these allegations could be interpreted to indicate that Otis's work caused or contributed to damage at the project, it was irrelevant for purposes of the duty to defend whether or not Otis's work – in fact – caused any damage. *Ibid.* Hartford thus had a duty to defend both *Buchholz* and *State Farm* as a matter of law.²

Hartford nonetheless quotes allegations in *Buchholz* describing problems with siding, decks, windows, and other issues, and then argues it had no duty to defend because the complaint does not specifically mention Otis or elevators. (Resp. Brief at 6-7.) Significantly, Hartford neglects to quote the following additional allegations:

1.15 That as a direct and proximate result of the breach of the construction contract by Defendant Wellman & Zuck as aforesated, the Plaintiffs herein have suffered the following damages:

* * *

(i) For any damages incurred by plaintiffs yet to be discovered, in a sum which shall be determined at time of trial.

* * *

² If Hartford had any doubt about its defense obligation, it was required to defend under a reservation of rights and then seek a judicial declaration that it owed no coverage and could withdraw from the defense. *VanPort* at 761.

2.6 That pursuant to the hold harmless, the Defendant Wellman & Zuck agreed to pay for all damages incurred by Plaintiffs arising out of any defect in construction. That said Plaintiffs have suffered the following damages by reason of the defective construction of Defendant Wellman & Zuck:

* * *

(i) For any damages incurred by plaintiffs yet to be discovered, in a sum which shall be determined at time of trial.

* * *

WHEREFORE, Plaintiffs pray for judgment against Defendant Wellman & Zuck . . . as follows:

* * *

(i) For any damages incurred by plaintiffs yet to be discovered, in a sum which shall be determined at time of trial.

CP 1708-09, CP 1711-14 (emphasis added).

These allegations demonstrate that the *Buchholz* plaintiffs were also suing Wellman for damages other than those specifically listed. It therefore makes no difference whether the *Buchholz* complaint specifically alleged Otis or the elevators, because – when read in their entirety – the allegations indicated that the plaintiffs’ claims included damage caused by other contractors on the project – including Otis.³ By suggesting that it

³ Hartford claims that its OCP policy issued to Wellman is “narrow” and only covers property damage “arising solely” out of Otis’s work. (*See, e.g.*, Resp. Brief at 1, 5.) The policy language, however, is not so limited and extends coverage to property damage “arising out of” operations performed by Otis and to Wellman’s acts or omissions in connection with the general supervision of Otis. *See CP 1683.*

did not owe a defense unless the complaint specifically used the words “Otis” or “elevators,” Hartford attempts to turn Washington’s duty to defend standards on their head. Contrary to Hartford’s argument, the allegations in the *Buchholz* and *State Farm* complaints are to be liberally construed in favor of a defense obligation, and the insurer must defend if the allegations are “conceivably” within coverage. *See, e.g., Hayden*, 141 Wn.2d at 64. It makes no difference whether or not the complaint specifically identified Otis or Otis’s work.

Moreover, the Supreme Court has made it eminently clear that information extrinsic to the complaint cannot be used to deny a defense if the complaint can be liberally interpreted to trigger a duty to defend. *See VanPort* at 761. Nonetheless, in the trial court and again in this appeal, Hartford attempts to justify its denial based on information outside of the complaints. For example, Hartford repeatedly argues that Wellman’s or Oregon Mutual’s alleged “knowledge” at the time of tender excuses Hartford’s unreasonable refusal to defend. (*See Resp. Brief* at 27, 30-31.) According to Hartford, Wellman and/or Oregon Mutual “knew” Otis’s work was not implicated because Oregon Mutual’s defense adjuster Ken Schroeder was provided a copy of the ERD Report, which allegedly “exonerated” Otis (when, in actuality, the ERD Report merely does not mention Otis or the elevators). (*See Resp. Brief* at 16.) Hartford also

points to declarations from the association’s counsel and expert and from Wellman’s defense counsel to support its argument that Otis’s work was not implicated.⁴ (*See* Resp. Brief at 9, 36.)

Hartford further tries to justify its denial by suggesting that Oregon Mutual – the insurer that actually defended Wellman – somehow should have investigated Hartford’s indemnity obligation before Wellman tendered to Hartford. (*See* Resp. Brief at 12.) Hartford even goes so far as to suggest that the court below was mistaken in initially finding a duty to defend because there had been little or no discovery in this case before that issue was decided. (*See* Resp. Brief at 17-18.)

These arguments are blatantly wrong because they suggest – contrary to *VanPort* and many other cases – that an insurer can justify a denial of defense merely by pointing to extrinsic evidence showing it would ultimately have had no duty to indemnify. Plainly, if an insurer cannot use such evidence in evaluating the complaint in the first instance, Hartford surely cannot use that evidence later after being sued for failing

⁴ Hartford’s Response Brief misstates the record in several places. For example, Hartford represents that Wellman’s counsel Frank Chmelik “did not have any objections to Hartford’s denial” of *Buchholz*. (Resp. Brief at 11.) In fact, Mr. Chmelik testified only that he could not recall. ***See* CP 1317 at 36:22-37:2.** Hartford also states that Oregon Mutual’s coverage adjuster James Rumppe “ordered a lawsuit without investigation or foundation.” (Resp. Brief at 36.) In fact, Mr. Rumppe testified that he was a “conduit” between Oregon Mutual’s coverage counsel and upper management with respect to Hartford, **CP 0988 at 14:1-8**, and that Hartford’s policy was reviewed by coverage counsel, ***see* CP 0989 at 23:19-24:2; CP 0991 at 50:13-17 and 51:1924.**

to defend. More to the point, however, the cases clearly recognize that an insurer must defend even if it would ultimately have no obligation to indemnify or pay the claim. *See, e.g., Travelers Ins. Cos. v. North Seattle Christian & Missionary Alliance*, 32 Wn. App. 836, 842, 650 P.2d 250 (1982) (factual issues regarding cause of plane crash were irrelevant as to duty to defend when underlying complaint alleged covered facts). *See also Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 564, 951 P.2d 1124 (1998) (duty to defend is broader than the duty to indemnify and may be triggered without exposing the insurer to coverage liability). This belies Hartford's claim that the tenders were "frivolous" or "misrepresentations" because Wellman allegedly "knew" Otis's work was not implicated. The allegations in the *Buchholz* and *State Farm* suits triggered Hartford's duty to defend – regardless of whether Hartford would have ultimately owed coverage. Hartford's arguments to the contrary are not well-taken.

Accordingly, Hartford had a duty to defend Wellman in the *Buchholz* and *State Farm* suits, and Hartford breached that duty when it refused to defend Wellman in those suits. ***See CP 1723-26; CP 1737-40.*** Oregon Mutual therefore requests this Court to reverse the trial court and to find that Hartford had a duty to defend Wellman in both underlying suits, and that Hartford breached that duty.

B. Hartford Refused To Defend Wellman In Bad Faith.

An insurer acts in bad faith when it refuses to defend its insured on grounds that are “unreasonable, frivolous, or unfounded.” *Kirk v. Mt. Airy*, 134 Wn.2d at 560. As discussed in Section IV.C. of Oregon Mutual’s opening brief, Hartford’s refusal to defend *Buchholz* was bad faith as a matter of law. The primary ground for Hartford’s denial was that the “[t]he damages alleged are not “property damage” . . . nor are the damages the result of an “occurrence” as defined by the Policy.” **CP 1724**. The complaint itself, however, expressly alleged “severe and significant water damage.” **CP 1707-08**. Hartford also suggested that property damage may have occurred outside of Hartford’s policy period, even though the complaint was silent as to when any damage occurred. *See CP 1724*. Hartford also declined to defend based on the “impaired property” exclusion “k”, even though that exclusion does not apply when physical property damage is alleged. *See CP 1725*. Because Hartford denied a defense by ignoring express allegations, assuming unpleaded facts and asserting inapplicable exclusions, Hartford’s refusal to defend *Buchholz* was “unreasonable, frivolous or unfounded” as a matter of law.

Moreover, even though the *State Farm* complaint alleged that State Farm’s claims against Wellman arose out of the *Buchholz* suit, **CP 1729**, Hartford nonetheless declined to defend *State Farm* based on an exclusion

for property damage that occurred after Otis's work was completed. CP 1738-39. This was based on Hartford's unfounded assumption that all of the property damage must have occurred post-completion because the original claim was brought by the "condo owners, living in the finished project." CP 1739. Neither complaint, however, alleged when any of the work was completed, and the date a plaintiff files suit does not in and of itself establish the date when the underlying injury or damage occurred.

Hartford further argues that its own conduct is immaterial and instead, the Court must examine Oregon Mutual's conduct. (*See Resp. Brief at 28.*) According to Hartford, "[t]he issues presented in Hartford's motions was whether *plaintiff's* misrepresentations precluded its bad faith and CPA claims under existing law." (*Id.* (emphasis in original).) This is nothing more than a diversionary tactic designed to draw attention away from Hartford's own actions. As stated above, Hartford's duty to defend was triggered by the underlying complaints, regardless of whether Hartford would have ultimately owed indemnity. It makes no difference for purposes of Hartford's duty to defend what Wellman or Oregon Mutual allegedly "knew" or what they allegedly did.

Hartford also tries to justify its conduct by arguing that its denials were, in fact, based on the limitation to damage arising from Otis's work:

Hartford's denial of Wellman's Buchholz tender was first and foremost based upon Section I of the OCP policy which only obligates Hartford to defend complaint allegations of "property damage" arising out of Otis' installation of the elevator or Wellman's supervision thereof.

(See Resp. Brief at 54.) This is pure "revisionist history." Although Hartford's letters quote the policy language in that regard, even a cursory review shows that Hartford's denials were based on an alleged lack of "property damage" or "occurrence," on unfounded assumptions, and on policy exclusions and limitations having no application to the allegations in the suits. *See CP 1723-26, CP 1737-40.* Hartford was required to "provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for the denial of a claim." WAC § 284-30-330(13). If – as it now contends – Hartford was truly denying Wellman's tenders based on a lack of Otis-related allegations, it should have made that clear in its letters to Wellman.⁵

Hartford's refusal to defend Wellman in *Buchholz* and *State Farm* was thus "unreasonable, frivolous or unfounded" as a matter of law, and the trial court should be reversed on this issue.

⁵ Perhaps most tellingly, Hartford is not arguing the propriety of any grounds originally stated in its denial letters.

C. **Harm Is Presumed From Hartford's Bad Faith Denial Of Defense And Hartford Is Estopped To Deny Coverage.**

Washington law is clear. When an insurer unreasonably refuses to defend, harm to the insured is presumed and the insurer is estopped to deny coverage or assert coverage defenses:

The defense may be of greater benefit to the insured than the indemnity. The defense must be prompt and timely. An insurer refusing to defend exposes its insured to business failure and bankruptcy. An insurer faced with claims exceeding its policy limits should not be permitted to do nothing in the hope that the insured will go out of business and the claims simply go away. To limit an insurer's liability to its indemnity limits would only reward the insurer for failing to act in good faith toward its insured. We therefore hold that when an insurer wrongfully refuses to defend, it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion. To hold otherwise would provide an incentive to an insurer to breach its policy. . . .

VanPort, 147 Wn.2d at 765-66 (citation omitted).

The only way an insurer can avoid estoppel is if it can rebut the presumption by affirmatively establishing that the insured, in fact, suffered no harm from its denial of defense. *Mutual of Enumclaw v. Dan Paulson Constr.*, 161 Wn.2d 903, 920, 169 P.3d 1 (2007). This presumption imposes an "almost impossible burden on the insurer. *Id.* at 921.

Hartford first claims its denials did not harm Wellman because "there is no . . . evidence that any act or omission by Hartford ever jeopardized Wellman's business or interfered with its ongoing defense."

(Resp. Brief at 32.) The cases are clear, however, that the presumption of harm is not rebutted merely by showing that the insured was fully defended by another insurer without the declining insurer's involvement. *McRory v. Northern Ins. Co.*, 138 Wn.2d 550, 980 P.2d 736 (1999) is instructive:

[T]he fact Wausau stepped in and defended McRory when McRory was sued . . . does not somehow exonerate Northern from its failure to defend and indemnify McRory as the primary insurer. Indeed, McRory received the benefit of its bargain with Wausau, but not from Northern. . . .

. . . Just as a tortfeasor should not profit from [his or her] wrongful act by virtue of the fortuity that the injured insured had the sagacity and foresight to be covered by insurance, . . . an insurer who improperly refuses coverage should not profit by the insured's foresight to have other insurance protection.

* * *

. . . Were Northern's position to prevail, it would encourage foot dragging by insurers. The problem would be compounded in cases of multiple insurers. Each insurer with a duty to defend and indemnify would be encouraged to wait and see if some other insurer would step in. We decline to condone such conduct.

Id. at 559-60 (citations omitted).

Hartford also argues that Wellman was not harmed because "there were no claims or actual damages connected to the elevator at any time in either suit," and because "[n]o portion of settlement funds or defense costs incurred by OMI were related to the elevator." (Resp. Brief at 32.) To the contrary, an insurer cannot rebut the presumption of harm merely by

arguing that it would have ultimately owed no indemnity:

Amicus argues if a jury or a court find[s] that liability rests outside the scope of coverage, any bad faith on the part of the insurer did not cause harm, and the insurer cannot be found liable. This argument misses the point. The insured and the insurer contracted for insurance. One of the benefits to this insurance contract is that the insurer will provide a defense when a claim arises alleging facts that may be covered by the contract. In this case the insurer breached the contract by failing to provide a defense *in bad faith*. The insured did not receive the benefit of the bargain, and we assume the insured was harmed by the bad faith breach. We feel it is appropriate to estop the insurer from arguing a coverage defense when the insurer breached the contract in bad faith. In such a situation any claim that should have been defended, but was not, will create liability for the insurer to pay at least policy limits.

Once the insurer breaches an important benefit of the insurance contract, harm is assumed, the insurer is estopped from denying coverage, and the insurer is liable for the judgment. . . .

. . . When an insurer breaches the duty to defend in bad faith, the insurer should be held liable not only in contract for the cost of the defense, but also should be estopped from asserting the claim is outside the scope of the contract and, accordingly, that there is no coverage. The coverage by estoppel remedy creates a strong incentive for the insurer to act in good faith, and protects the insured against the insurer's bad faith conduct.

Kirk, 134 Wn.2d at 563-64 (italics in original; underlining added; citation omitted).

Hartford also points to *Ledcor Indus. (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 206 P.3d 1255, review denied, 167 Wn.2d 1007 (2009) in hopes of excusing its bad faith failure to defend. *Ledcor*, however, is inapposite. In that case, Ledcor was an “additional

insured” under a Mutual of Enumclaw (“MOE”) policy issued to Zanetti. Although MOE agreed to defend Ledcor, it was found to have acted in bad faith by failing to timely accept Ledcor’s tender and failing to promptly participate in Ledcor’s defense, as required by *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986). See *Ledcor*, 150 Wn. App. at 9 ¶¶ 15-18. Under those facts, this Court concluded that any estoppel from MOE’s bad faith did not also require MOE to pay for liability caused by wrongdoers other than Zanetti. *Ledcor*, 150 Wn. App. at 11 ¶ 23. This case is materially different because in *Ledcor*, MOE agreed to defend but then violated the obligations of a defending insurer under *Tank*. Here, Hartford refused to defend at all, so this case is instead controlled by those cases addressing a bad faith denial of defense, e.g., *VanPort, supra*; *Kirk, supra*. Because it breached the insurance contract in bad faith, Hartford is estopped from arguing that the underlying lawsuits were outside the scope of its coverage.⁶

Additionally, Hartford’s arguments and the court below misplaced the parties’ respective burdens. Because Hartford refused to defend Wellman in bad faith, the burden then shifted to Hartford to establish as a

⁶ Hartford argues that it should not have to pay damages it did not contract to insure, citing *Polygon Nw. Co. v. American Nat’l Fire Ins. Co.*, 143 Wn. App. 753, 189 P.3d 777 (2008). *Polygon* is inapposite however, because it did not involve bad faith or estoppel.

matter of law that its conduct did not harm Wellman. *See, e.g., Dan Paulson, supra*, 161 Wn.2d at 922. It was not Oregon Mutual's burden to produce evidence showing that Wellman had been harmed. Moreover, cases finding that the presumption was rebutted involved unique circumstances wherein the insured was shielded from any liability exposure to the third-party claimant. *See, e.g., Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wn. App. 804, 120 P.3d 593 (2005) (presumption of harm was rebutted where insureds declared bankruptcy for reasons other than insurer's denial of defense). In this case, but for the fortuity that Wellman was also insured by Oregon Mutual, Hartford's bad faith refusal to defend would have exposed Wellman to a massive liability that it may not have had the resources to fight or settle. Hartford cannot use the fortuity of Oregon Mutual's presence to avoid the consequences of its own wrongful conduct. *See McRory, supra*.

Hartford also claims the estoppel remedy for insurer bad faith is subject to equitable defenses. (*See Resp. Brief at 33-37.*) Among other things, Hartford argues that Wellman and Oregon Mutual had "unclean hands" because they "pursu[ed] unfounded coverage from Hartford," because they allegedly "knew" there was no elevator-related damage when Wellman tendered to Hartford, because there is evidence extrinsic to the complaint showing that Hartford would not have had any indemnity

obligation, and because “[t]here was no inquiry or reasonable investigation regarding the scope of coverage for Wellman under Hartford’s OCP policy.” (*Id.* at 36-37.)

This novel argument finds no support in the cases addressing estoppel in the context of insurer bad faith. It also ignores the clear standards for duty to defend and the fact that the *Buchholz* and *State Farm* complaints triggered Hartford’s duty to defend. Furthermore, if anyone has “unclean hands” it is Hartford, which breached its duty to defend, ignored the allegations in the complaints, made unfounded assumptions and raised inapplicable exclusions. Hartford’s attempt to paint Wellman and Oregon Mutual as “bad actors” is a red herring.

Because Hartford refused to defend in bad faith, harm is presumed, Hartford has not rebutted that presumption, and Hartford is estopped from denying coverage for the costs that were paid to defend and settle the *Buchholz* and *State Farm* suits. The trial court should therefore be reversed on this issue.

D. Hartford Violated The CPA.

Hartford argues that “[t]he focus of Hartford’s dismissal motion granted by the trial court was *OMI*’s conduct.” (Resp. Brief at 38 (emphasis in original).) Hartford then blithely asserts that “*OMI* offers no substantive evidence to overturn the trial court dismissal order.” (*Id.*) To

the contrary, in response to Hartford's motion below, Oregon Mutual submitted undisputed evidence demonstrating Hartford's CPA violations. ***See CP 491-502.***

Moreover, Hartford again attempts to divert attention away from its own bad faith by claiming Wellman's tenders were misrepresentations or fraudulent because of what Wellman or Oregon Mutual allegedly "knew." These arguments are fabrications and irrelevant as to whether Hartford's bad faith refusal to defend violated the CPA. For the reasons stated above and those set forth in Oregon Mutual's opening brief, Hartford violated the CPA and caused injury to Wellman. The trial court's order dismissing Oregon Mutual's CPA claim should also be reversed.

E. Hartford Was Negligent.

Contrary to Hartford's brief response, Hartford was negligent in investigating and handling Wellman's tenders. As stated in Section B above, Hartford ignored express allegations of property damage and also based its denials on inapplicable exclusions and incorrect assumptions. Even giving Hartford the benefit of the doubt for argument's sake, and assuming it merely "overlooked" certain allegations in the complaints, Hartford would still have breached a duty of reasonable care owed to Wellman. This breach proximately caused damage to Wellman in the

form of attorney fees incurred in Wellman's efforts to get Hartford to reconsider its denials, and also defense costs that Hartford should have paid in defending the suits, among other things. Accordingly, for these reasons and for the reasons set forth in Oregon Mutual's opening brief, the trial court should also be reversed on this issue.

F. Oregon Mutual Is Entitled To Its Attorney Fees And Costs In The Trial Court And In This Appeal.

As stated in previous sections, Hartford breached its duty to defend Wellman in both underlying suits, and Oregon Mutual (as Wellman's assignee) was compelled to sue Hartford in order to enforce Wellman's rights under Hartford's policy. Wellman's tenders were neither fraudulent nor improper as Hartford suggests, and if anyone has "unclean hands," it is Hartford – the insurer that refused to defend in bad faith. Oregon Mutual is therefore entitled to recover its attorney fees and costs in the trial court and in this appeal under *Olympic Steamship Co v. Centennial Ins. Co.*, 117 Wn.2d 37, 53-54, 811 P.2d 673 (1991) and RAP 18.1

G. Hartford's Cross-Appeal Should Be Denied.

Lastly, Hartford's cross-appeal and CR 11 claims are not well-taken. As stated above and in Oregon Mutual's opening brief, Hartford breached its duty to defend Wellman in bad faith, and Hartford is now estopped to deny coverage. It makes no difference what Wellman or

Oregon Mutual allegedly knew when Wellman tendered to Hartford. The only thing that mattered was whether the underlying complaints alleged claims “conceivably” covered under Hartford’s policy.

Hartford’s cross-appeal also suggests that Hartford does not have a duty to defend claims “based upon misrepresentations.” (*See* Resp. Brief at 55-57.) Oregon Mutual agrees, as a general proposition. For example, an insurer should not be required to defend a liability suit against its insured that is fabricated or collusive, *e.g.*, where the plaintiff and insured have colluded and deliberately caused property damage in hopes of recovering funds under the insured’s policy. There is Washington law addressing these of situations. *See, e.g.*, RCW 48A.30.050 (authorizing insurers to report fraudulent claims to law enforcement and to undertake civil actions against persons who have engaged in fraudulent conduct); *Mutual of Enumclaw v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988) (insured’s misrepresentations in presenting first-party claim voided coverage and barred insured’s bad faith and CPA claims).

Hartford, however, asks the Court to extend these principles to an entirely different situation, where there is a bona fide suit against the insured, and the insured tenders its defense even though the insurer might not have any duty to indemnify. As previously stated, Hartford had a duty to defend regardless of whether it would have owed indemnity for the

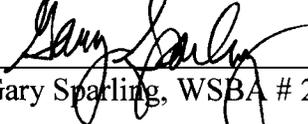
Buchholz or *State Farm* suits. Those suits were neither fabricated nor collusive, and Wellman faced a very real and substantial liability exposure to the plaintiffs in those suits. Thus, even if Wellman's alleged "state of mind" when tendering could somehow be relevant to Hartford's duty to defend – which it is not – there was no fraud or misrepresentation here. To find otherwise would contravene clear case law and would have a chilling effect on an insured's decision to tender a suit to its liability insurer. This case simply does not support the substantial and unwarranted extension of law advocated by Hartford.

H. Conclusion.

For the foregoing reasons, and for the reasons stated in its opening brief, Oregon Mutual respectfully requests this Court to find that Hartford breached its duty to defend Wellman in the *Buchholz* and *State Farm* suits, that Hartford's refusal to defend was in bad faith, that Hartford is estopped to deny coverage, that Hartford violated the CPA, that Hartford was negligent, and that Oregon Mutual is entitled its attorney fees and costs under *Olympic Steamship* and RAP 18.1

RESPECTFULLY SUBMITTED this 13th day of October, 2011.

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Mutual Insurance Company

DECLARATION OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

On October 13, 2011, I served a true and correct copy of Reply Brief **(with attached Declaration of Service)** on parties in this action as indicated:

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Dated this 13th day of October, 2011



Angela Murray
Legal Secretary to Gary Sparling