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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

OREGON MUTUAL INSURANCE COMPANY, an Oregon corporation,

Plaintiff/Appellant/Cross-Respondent

v.

HARTFORD FIRE INSURANCE COMPANY,

Defendant/Respondent/Cross-Appellant

RESPONDENT/CROSS-APPELLANT HARTFORD FIRE INSURANCE COMPANY'S BRIEF

John P. Hayes, WSBA# 21009
Martin J. Pujolar, WSBA# 36049
Forsberg & Umlauf, P.S.
Attorneys for Defendant Respondent/Cross-Appellant Hartford Fire Insurance Company
901 Fifth Avenue, Suite 1400
Seattle, Washington 98164
Telephone: (206) 689-8500

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HARTFORD FIRE INSURANCE COMPANY'S RESPONSE BRIEF

I. INTRODUCTION

This insurance matter follows two underlying construction defect litigations involving the Olympic Condominium project in Bellingham, Washington. Appellant Oregon Mutual Insurance Company ("OMI") insured the general contractor, Wellman & Zuck, Inc. ("Wellman") under a broad commercial general liability insurance policy and paid to defend and settle both litigations. Wellman was also the named insured under a narrow Owners and Contractors Protective ("OCP") liability policy issued by Hartford on behalf of Otis Elevator Company ("Otis"). Wellman subcontracted with Otis for the sale and installation of an elevator at the Project. Otis' scope of work was limited solely to the elevator. Hartford's OCP policy specifically and unambiguously limits defense and indemnity coverage for Wellman to "property damage" arising solely out of Otis' elevator.

OMI and Wellman knew that the Otis elevator was never at issue in the underlying litigations, was never an element of condominium repair cost, and no part of the underlying defense or settlements paid by OMI was attributed to the elevator. This matter should have never been litigated. Wellman and OMI knew there were no elevator-related claims or damages prior to tendering and suing Hartford under the OCP policy.

Extensive discovery which had to taken by Hartford showed there was never a single fact implicating the Otis elevator and, thus Hartford's OCP policy. Not a single dollar of underlying defense fees and costs paid by OMI were in any way related to the Otis elevator.

Hartford was forced to defend OMI's frivolous and unfounded contractual and extra-contractual claims and conduct extensive discovery and motion practice to establish that Wellman's and OMI's pursuit of coverage from Hartford under its limited OCP policy was an attempt to manufacture coverage and extra-contractual claims. The trial court ultimately saw through the pretextual tenders and complaint and lack of good faith pleadings and dismissed all of plaintiff's contractual and extra-contractual claims. This outcome resulted from a series of motions and dismissal orders confirming OMI's misrepresentations, bad faith, "unclean hands", and the lack of any evidence whatsoever of any damages related to the Otis elevator.

The trial court's orders dismissing all of OMI's contractual and extra-contractual claims against Hartford were based upon *OMI's and Wellman's* conduct, i.e., "unclean hands", bad faith, and misrepresentation. OMI attempts to distract this Court from the orders by the trial court based on its behavior by focusing on Hartford's alleged acts and/or omissions. Such arguments are irrelevant to the orders on appeal.

Hartford's conduct was not at issue before the trial court in the summary judgment orders on appeal. OMI offers no substantive grounds to overturn the underlying orders.

OMI should have abandoned this case after losing in the trial court and after the baselessness of its suit was uncovered. OMI's appeal, like its underlying tenders and suit against Hartford, is not brought in good faith and extends years of groundless litigation. OMI's appeal is part of the continuation of misrepresentation and bad faith conduct. This appeal violates CR 11. The trial court orders dismissing all of OMI claims should be affirmed.

II. COUNTER STATEMENT OF CASE

A. Hartford's Policy

This matter follows two underlying litigations involving the Olympic Condominium project ("Project") in Bellingham, Washington, namely, *Buchholz v. Wellman & Zuck, Inc.* (Whatcom County Superior Court Cause No. 02-2-00101-3) and *State Farm Fire & Casualty Co. v. Wellman & Zuck, Inc.* (Whatcom County Superior Court Cause No. 03-2-01721-0). (CP 1794-1804.) Wellman & Zuck, Inc. ("Wellman") was the general contractor. (*Id.*) Wellman subcontracted with Hartford's insured, Otis Elevator Company ("Otis"), for the sale, purchase, and installation of an elevator at the Project. (CP 1468-1489.) Otis' scope of work was

limited solely to providing and installing the elevator. (*Id.*) Wellman's commercial general liability insurer, Oregon Mutual Insurance Company ("OMI"), is pursuing the claims against Hartford in its own name and as the assignee of Wellman. (CP 1794-1804.) Wellman is not a party.

Wellman was insured under a comprehensive general liability ("CGL") policy issued by OMI for the 5/19/94 – 5/1/99 policy periods. (*Id.*) Hartford insured Wellman under a limited Owners and Contractors Protective ("OCP") liability policy for the 10/1/95-10/1/96 policy period. (CP 1491-1513.) Wellman is the "Named Insured" under the limited OCP policy. (CP 1492.) Hartford's OCP policy unambiguously limits coverage and defense for Wellman to "property damage" arising out of Otis' work at the Project. (CP 1491-1513.) Section I(1)(a) of Hartford's OCP policy provides in pertinent part:

> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "***property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages.*** ...

CP 1506 (emphasis added).

Section I(1)(b) of the OCP policy states:

> b. This ***insurance applies*** to "bodily injury" and "property damage" ***only if***:

> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory" ***and arises out of:***
>
> (i) ***Operations performed for you by the "contractor"*** [Otis] at the locations specified in the Declarations; or
>
> (ii) Your acts or omissions in connection with the general supervision of such operations; ...

Id. (emphasis added).

Section V(3) of Hartford's OCP policy defines "contractor" to mean "the contractor designated in the Declarations." (CP 1511.) The Declarations page identifies Otis as the designated "contractor". (CP 1513.) Section V(7) of the policy defines "occurrence" as "an accident including continuous or repeated exposure to substantially the same general harmful conditions." (CP 1512.) Sections V(8)(a) and (b) of the policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property" or "loss of use of tangible property that is not physically injured." (*Id.*) Hartford's OCP policy under which Wellman claimed coverage limited coverage and defense for Wellman to "property damage" arising solely out of Otis' scope of work in selling and installing an elevator. OMI does not dispute the limited scope of Hartford's OCP policy.

B. Buchholz Claim

The first underlying action, *Buchholz v. Wellman & Zuck, Inc.*, was filed on January 17, 2002. (CP 1515-1524.) The *Buchholz* plaintiffs were the Developers of the condominium who sued Wellman for Breach of Contract and a Hold Harmless Agreement. (*Id.*) Paragraph 1.12 of the *Buchholz* complaint alleged that "Defendant Wellman & Zuck breached the construction contract and its warranty by (1) failing to provide work that was free from defect." (*Id.*) Paragraph 1.13 of the Complaint alleges that "as a direct and proximate result of the breach of contract as aforestated, the building located at 1301 West Holly Street and condominium common spaces therein have suffered severe and significant water damage which required repair." (*Id.*) Thereafter, paragraphs 1.15(c)-(f) and 1.15(h) of the *Buchholz* complaint specifically allege the actual damages and defects at issue:

1.15(c):	For damages incurred for the installation of ***siding***, ...
1.15(d):	For damages incurred in ***installing vinyl covering applied to decks***, ...
1.15(e):	For damages for Defendant's failure to install ***window coverings***, ...
1.15(f):	For damages for Defendant's failure to install ***landscaping*** in the amount allowed in the contract, ...
1.15(h):	For damages incurred in repairing defective ***roofing and flashing*** ...

Id. (emphasis added).

The same specific defect allegations are reiterated in the Prayer for Judgment. (*Id.*) Neither an Otis elevator or even the word "elevator" is mentioned anywhere in the complaint. Wellman's president, Mr. Brian Wellman, confirmed at deposition that the allegations in the *Buchholz* complaint "sum up the alleged areas of construction defects at the condominium project." (CP 1283.) The *Buchholz* complaint does not remotely reference or allege any defects or damages caused by or associated with Otis' scope of work or its supervision. (CP 1515-1524.) As set forth below, there was good reason – there were none.

Mr. Wellman testified that Wellman was on notice of the *Buchholz* defect complaints prior to the filing of the complaint against it and investigated the defect allegations and offered to make repairs. (CP 1283-1284.) Wellman's own pre-litigation investigation uncovered no defects or damages regarding the elevator. (CP 1283-1285.) Mr. Wellman did not even recall any allegations of defects or damages regarding Otis' work or water damage caused by Otis' work. (CP 1275, 1286.) Mr. Wellman agreed that coverage for Wellman under Hartford's OCP policy was limited to damage from Otis' work and that there were never any allegations of defects or damages arising out of Otis' work. (CP 1276,

1280, 1281, 1286.) Wellman, nonetheless, joined with OMI to assert such damages to secure coverage from Hartford.

On February 4, 2002, Wellman tendered the defense of *Buchholz* to OMI. (CP 1291.) OMI accepted and defended Wellman in the *Buchholz* matter under its CGL policy. OMI's claims professional assigned to handle the defense of Wellman, Mr. Kenneth Schroeder, testified in this matter that he reviewed the *Buchholz* complaint and agreed that there were no allegations of defects or damages related to the elevator or Otis. (CP 1296.) Mr. Schroeder was never aware of any facts implicating the liability of Otis at any time. (CP 1297.) Mr. Schroeder nonetheless could not explain why OMI pursued a tender of defense and sued Hartford. (*Id.*)

The West Olympic Homeowners Association ("Association") intervened in the *Buchholz* matter and filed a third-party complaint alleging construction defects and damages. (CP 1526-1537.) The Association's forensic expert, Mr. Colin Murphy of Exterior Research & Design ("ERD"), investigated the Project and prepared a highly detailed report, dated November 4, 2002, identifying construction defects and damages and making repair recommendations. (CP 1539-1572.) Mr. Murphy's report was made available to Wellman. Mr. Murphy did not observe or record any defects or damages or repair issues arising out of the

installation of the Otis elevator. (*Id.*) The word elevator does not appear even once in his lengthy forensic report. (*Id.*)

Mark Reichlin of Western Exterior Services, Inc. was retained by the Association to estimate the cost to repair the defects and damages at the Project. (CP 1419-1458.) Mr. Reichlin's cost estimate for remediation was $1,296,992.97. (CP 1438-1456.) The estimate did not include a single dollar of repair cost related to the elevator. (*Id.*)

The Association's counsel, David Von Beck, confirmed that the Association never made any allegations of defects or damages related to the elevator and that none of the settlement funds recovered by the Association from OMI were used to repair damages associated the elevator. (CP 1414-1418.) The elevator was simply never at issue. (*Id.*) OMI in all the briefing in this matter has never refuted this core fact.

Wellman's defense counsel assigned by OMI, Dino Vasquez, testified that the defects at the Project pertained only to windows and window frames, siding, decks, roofing, and related concrete finishes. (CP 1302.) Mr. Vasquez did not identify any claims whatsoever regarding the elevator and no OMI settlement funds were allocated to the elevator. (CP 1306-1307 and CP 1305.) None of the defense bills paid by OMI included fees or costs related to the elevator. (CP 227-229.)

On January 9, 2003, twelve (12) months after the filing of the *Buchholz* complaint and 60 days after the publication of ERD's November 4, 2002 report, and being fully appraised as to the non-involvement of Otis and its elevator, Wellman nonetheless tendered defense to Hartford for the *Buchholz* matter. (CP 1309.) The notice was drafted by Wellman's corporate counsel, Frank Chmelik. (*Id.*) Mr. Chmelik did not have a practice of reviewing subcontracts, insurance policies, or complaints prior to tendering claims to insurance companies as part of his services for Wellman. (CP 1312, CP 1313 and 1315.) Mr. Chmelik could not recall any basis for Wellman's tender to Hartford. (CP 1316-1317.) He just did it. (*Id.*) Mr. Chmelik was not even in possession of Hartford's OCP policy at the time he tendered Wellman's defense for the *Buchholz* matter. (CP 1304.) Mr. Chmelik could not contradict Mr. Murphy's statement that there were no defects, damages, or repair recommendations related to the elevator. (CP 1315.) In short, when Wellman tendered to Hartford, it had no information that the Otis elevator was implicated. To the contrary, Wellman knew, through discovery in the underlying litigations, that there were no elevator-related claims or damages.

Hartford denied Wellman's *Buchholz* tender of defense and indemnity based upon the complaint which does not mention Otis or an

elevator and Section I of Hartford's OCP policy, the Insuring Agreement. (CP 1574-1577.) Only elevator-related property damages are covered by Hartford's limited OCP policy. (*Id.*) Hartford's denial letter stated that, aside from any applicable exclusions, no coverage was provided under the Insuring Agreement. (*Id.*) Coverage under Hartford's policy did not apply because the elevator was not at all implicated. (CP 1491-1513.) Mr. Chmelik did not have any objections to Hartford's denial. (CP 1317 and CP 1272, ¶8.)

OMI defended and settled the *Buchholz* matter for $75,000.00. OMI funded the entire defense of Wellman. (CP 1382.) Despite repeated opportunities in motion practice in this case, not one dollar of defense fees and costs paid by OMI has been identified as related to the Otis elevator.

C. <u>State Farm Claim</u>

The second underlying action, *State Farm Fire & Casualty Co. v. Wellman & Zuck, Inc.*, was filed on July 21, 2003. (CP 1579-1583.) State Farm insured Buchholz, the Developer, and funded the Developer's separate settlement with the Association. State Farm brought a subrogation action against Wellman to recover payments made to the Association. (*Id.*) The *State Farm* complaint also does not allege any defects or damages associated with Otis' scope of work. (*Id.*) It also does not mention an elevator. (*Id.*)

On August 17, 2004, 13 months after the filing of the *State Farm* complaint, Mr. Jim Rumpee, a senior claims adjuster for OMI, directed Mr. Chmelik to "aggressively pursue" Hartford and file a bad faith action if necessary. (CP 1322.) Mr. Rumpee never reviewed Hartford's OCP policy, had no prior experience with OCP policies, never asked for a coverage opinion, and had no knowledge as to the coverage afforded to Wellman under Hartford's OCP policy. (CP 1236-1247.) Mr. Rumpee never reviewed Otis' contract, had no knowledge regarding Otis' scope of work, never reviewed any defect reports, including the ERD report, and was not aware of any defects or damages pertaining to the installation of the elevator. (CP 1241, 1242, 1246-1247.) Moreover, despite his direction to file a bad faith claim, Mr. Rumpee had no knowledge regarding Hartford's investigation of Wellman's tenders. (CP 1244.) Mr. Rumpee conceded that he did not conduct any investigation regarding Hartford's coverage obligations prior to directing Mr. Chmelik to "aggressively pursue" Hartford and to file a bad faith lawsuit. (CP 1243-1244.) OMI admittedly had no basis to direct counsel to make a tender to Hartford or initiate a claim for bad faith or to bring suit. (*Id.*)

On August 19, 2004, despite the total absence of elevator-related defects or damages, Wellman's corporate counsel, Mr. Chmelik, tendered its defense and indemnity for the *State Farm* matter to Hartford under

Hartford's limited OCP policy. (CP 1585-1587.) Mr. Chmelik's letter erroneously stated that "this lawsuit implicates Commercial General Liability Policy Number 02 CSE T16887 issued by The Hartford to Wellman & Zuck." (*Id.*) Hartford's policy however is a limited OCP policy, not a plenary CGL policy. Mr. Chmelik had no understanding of the distinction.

Mr. Wellman, who hired Mr. Chmelik, testified that coverage for Wellman was limited to damage from Otis' work and there were no allegations of defects or damages arising out of Otis' work at any time. (CP 1286.) Mr. Wellman further testified that Wellman's defense of *State Farm* was tendered to Hartford "because it was standard." (CP 1287-1288.)

Hartford denied Wellman's *State Farm* tender based upon policy provisions including the absence of elevator-related property damage and coverage limited to property damage to work performed solely by Otis. (CP 1590-1592.)

OMI defended and settled the *State Farm* matter for $750,000. OMI funded the entire defense of Wellman for both *Buchholz* and *State Farm*. (CP 1282.) Wellman assigned all of its alleged "rights" under the Hartford's OCP policy to OMI, which then sued Hartford. OMI, after defending and indemnifying two settlements, knew full well there was no

foundation for this suit. Despite many opportunities in motion practice, OMI has not proved that a single defense dollar went to elevator-related issues in the two defect cases.

D. <u>OMI's Claim for Defense Costs</u>

OMI is seeking recovery of $123,429 from Hartford for defense fees and costs paid by OMI for *Buchholz* and *State Farm*. Hartford requested OMI to produce "any and all documents evidencing defense fees and costs which were incurred and paid by Oregon Mutual Insurance Company pertaining to or related to any claims regarding Otis Elevator and/or the installation of the elevator at the West Olympic Condominium project in *Buchholz*." (CP 227-229.) OMI provided the following non-responsive discovery answer:

> **<u>RESPONSE:</u>**
>
> * * * *
>
> Subject to and without waiving this or any other objection, documents responsive to this request include the following:
>
> - The complaint in *Buchholz v. Wellman & Zuck, Inc.*;[1]
> - OMI-DEF 000001-130;[2]
> - Hartford Policy No. 02 CSE T16887, ...;[3]

---

[1] The *Buchholz* complaint makes no reference to defense fees and costs ncurred by OMI in defending [non-existent] elevator claims. (CP 1515-1524.)

[2] The attorney billings for *Buchholz* and *State Farm* make no reference to the amount of defense fees and costs allegedly incurred by OMI in defending [non-existent] elevator claims. (CP 232-361.)

- January 9, 2003 letter from Frank Chmelik, ...;[4]
- September 12, 2008 Order Re: Plaintiff Oregon Mutual's Motion for Partial Summary Judgment Re: Hartford's Duty to Defend and Order Re: Hartford's Counter-Motion for Partial Summary Judgment Re: Duty to Defend;[5] and
- Deposition of Brian Wellman, taken January 22, 2007.[6]

CP 227-229.

None of the documents referenced by OMI provide any evidence whatsoever of defenses fees and costs related to Otis or the elevator. None of OMI's underlying briefs regarding duty to defend and fees do either.

The timeline of events regarding Wellman's tenders to Hartford is summarized as follows:

January 17, 2002:	*Buchholz* Complaint filed.
February 4, 2002:	Wellman's tender of defense in *Buchholz* to OMI, its commercial general liability carrier.
November 4, 2002:	ERD report regarding alleged construction defects published. No implication of Otis.

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[3] Hartford's OCP policy makes no reference to defense fees and costs incurred in defending [non-existent] elevator claims. (CP 1491-1513.)

[4] Mr. Chmelik's January 9, 2003 letter to Hartford makes no reference to defense fees and costs. (CP 1309.)

[5] The trial court's September 12, 2008 Order makes no reference to defense fees and costs. (CP 953-955.)

[6] Mr. Wellman offers no deposition testimony regarding the amount of defense fees and costs allegedly incurred by OMI in defending [non-existent] elevator claims. Mr. Wellman testified to the absence of any elevator-related claims. (CP 1275, 1286.)

January 9, 2003:	Wellman's tender to Hartford re: *Buchholz.*
July 21, 2003:	*State Farm Complaint* filed.
August 17, 2004:	Letter from OMI to Wellman's counsel directing him to aggressively pursue Hartford, including pursuing bad faith claims.
August 19, 2004:	Wellman's tender to Hartford regarding *State Farm.*

There was a 12-month delay between the filing of the *Buchholz* complaint and Wellman's tender to Hartford. The ERD report exonerating Otis of any potential liability was published on November 4, 2002, more than 60 days prior to Wellman's tender to Hartford on January 9, 2003 for *Buchholz.*

There was a 13-month delay between the filing of the *State Farm* complaint on July 21, 2003 and Wellman's tender to Hartford on August 19, 2004. The ERD report was published on November 4, 2002, 21 months prior to Wellman's tender to Hartford on August 19, 2004 for *State Farm.*

The factual evidence clearly establishes that Wellman [and OMI] did not defend elevator-related claims prior to tendering or suing Hartford.

Wellman and OMI's actions have been false, frivolous, unfounded, with "unclean hands"[7], and in bad faith.

E. Proceedings Below

On November 10, 2005, OMI filed its complaint against Hartford alleging causes of action for declaratory judgment, breach of contract, bad faith, money damages and other relief. (CP 1792-1804).

On May 5, 2006, OMI filed its motion for summary judgment re: bad faith, estoppel, Consumer Protection Act ("CPA") violations, and *Olympic Steamship* fees and costs. (CP 1761-1782.). On June 26, 2006, Hartford filed its opposition to OMI's motion and cross-motion. (CP 1649-1675). On October 6, 2006, prior to full discovery, the trial court entered an Order that Hartford breached its duty to defend in bad faith based upon a reading of the complaint. (CP 1369-1372). The trial court did not make any rulings on the causation or damages elements of OMI's duty to defend claims.

On March 2, 2007, OMI filed its motion for partial summary judgment to establish "harm" from Hartford's alleged bad faith failure to defend. (CP 1350-1358.) On June 8, 2007, after extensive discovery was submitted, the trial court denied OMI's motion for partial summary

[7] As set forth below, the trial court expressly found that Wellman/OMI acted with "unclean hands" and in bad faith.

judgment that Wellman was harmed or prejudiced by Hartford. (CP 1221-1223).

On June 26, 2007, Hartford filed a motion to vacate the trial court's October 6, 2006 initial order that Hartford breached its duty to defend Wellman in bad faith because "harm" is an essential element of a bad faith claim and that discovery revealed the frivolity of Wellman's and OMI's tenders and the absence of damages. (CP 1215-1220). On August 24, 2007, the trial court granted the motion and vacated its October 6, 2006 order that Hartford breached its duty to defend in bad faith. (CP 1196-1198).

On September 4, 2007 OMI filed a motion requesting the trial court to reconsider and/or clarify whether it vacated its October 6, 2006 order regarding the duty to defend. (CP 1187-1195). On October 19, 2007, after considering further briefing and oral argument, the trial court denied OMI's motion for reconsideration/clarification affirming that its October 6, 2006 order was vacated. (CP 1143-1145.) OMI's subsequent Motion for Discretionary Review to the Court of Appeals was also denied.

OMI filed another motion for partial summary judgment regarding Hartford's alleged breach of contract/duty to defend Wellman in *Buchholz* and *State Farm*. (CP 1032-1042). On September 12, 2008, the trial court entered an order that Hartford had a contractual duty to defend Wellman in

Buchholz based upon a broad reading of the complaint, but not *State Farm.* (CP 953-955.) OMI's claim that Hartford breached its duty to defend Wellman in *Buchholz* was subsequently dismissed after additional discovery on alternative grounds, *i.e.*, the absence of causation and damages. (CP 68-70.)

On June 19, 2008, Hartford filed its motion to preclude OMI from the remedy of coverage by estoppel based upon Wellman's and OMI's "unclean hands" and bad faith in tendering unfounded and frivolous claims to Hartford. (CP 1123-1142.) On October 8, 2008, the trial court granted Hartford's motion and denied OMI the remedy of estoppel into coverage finding the Wellman's and OMI's pursuit of coverage from Hartford was with "unclean hands" and in bad faith. (CP 956-958.)

On February 5, 2009, Hartford filed its motion to preclude OMI from the equitable remedy of *Olympic Steamship* fees and costs based upon Wellman's and OMI's "unclean hands" and bad faith in tendering unfounded and frivolous claims to Hartford. (CP 916-952.) On April 10, 2009, the trial court entered its order denying OMI the remedy of *Olympic Steamship* fees and costs finding the Wellman's and OMI's pursuit of coverage from Hartford was with "unclean hands" and in bad faith. (CP 871-873.)

On April 30, 2009, Hartford filed its motion to dismiss OMI's remaining claims, including OMI's contribution claim. (CP 854-870). On June 12, 2009, the trial court granted Hartford's motion in part and denied it in part. (CP 790-792). The trial court properly dismissed OMI's contribution claim against Hartford based upon lack of any opposition and because OMI and Hartford did not insure the same risks. (CP 790-792.)

On August 30, 2010, Hartford filed its motion for summary judgment dismissal of OMI's bad faith and CPA claims based upon Washington law that an insured that makes misrepresentations to an insurer is not entitled to bring a CPA or bad faith claim. (CP 617-789). On October 1, 2010, the trial court dismissed OMI's bad faith and CPA claims based on Wellman's and OMI's "unclean hands", bad faith, and serial misrepresentations. (373-375).

On December 16, 2010, after further discovery on OMI's alleged damages, Hartford filed its motion for summary judgment dismissal of plaintiff's remaining breach of contract and negligence claims. (CP 193-209.) Because OMI failed to produce <u>any</u> evidence whatsoever of damages allegedly caused by Hartford, on February 4, 2011, the trial court dismissed OMI's remaining breach of contract and negligence claims. (CP 68-70.) OMI could not prove any defense fees or costs or settlement payments related to the Otis elevator.

On January 21, 2011, considering the trial court's orders and findings that Wellman's and OMI's pursuit of coverage from Hartford was with "unclean hands", in bad faith, based upon misrepresentations, and the absence of any damages, Hartford filed a motion for the trial court to reverse its September 12, 2008 order that Hartford breached its contractual duty to defend Wellman in the *Buchholz* matter based solely upon a reading of the complaint.[8] (CP 143-155.) On February 4, 2011, the trial court denied Hartford's motion for reversal. Hartford appeals that denial.

III. ARGUMENT

A. Standard of Review

Review of summary judgment orders is *de novo*. *Hogan v. Sacred Heart Medical Center*, 101 Wn. App. 43, 2 P.3d 968 (2000). OMI's appeal arises from a series of summary judgment orders issued in Hartford's favor.

B. The Trial Court Properly Vacated Its October 6, 2006 Order That Hartford Breached Its Duty To Defend in Bad Faith

Prior to discovery, the trial court granted OMI's motion that, based upon a reading of the complaints, Hartford breached its duty to defend in bad faith. (CP 1369-1372.) After extensive discovery revealed the frivolity and bad faith of OMI's claims, on June 8, 2007, the trial court

[8] This was essentially a "clean-up" motion in that the breach of the contractual duty to defend claim had been dismissed for failure to prove damages.

denied OMI's motion on the bad faith duty to defend issue of "harm" and vacated its original order that Hartford breached its duty to defend in bad faith. (CP 1221-1223.)

"Harm" is an essential element of a bad faith claim. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). Thereafter, Harford moved the trial court to vacate its October 6, 2006 Order that Hartford breached its duty to defend in bad faith entered before discovery established that Wellman's tenders under Hartford's OCP policy were made with knowledge that there were no elevator-related damages. (CP 1215-1220). OMI recognized in its opposition brief that Hartford was seeking to vacate the October 6, 2006 order in total. (CP 1203-1206.) After full briefing and oral argument, the trial court completely vacated its October 6, 2006 Order that Hartford breached its duty to defend in bad faith. (CP 1196-1198).

OMI next filed a motion requesting the trial court to reconsider and/or clarify its vacation order regarding the duty to defend. (CP 1187-1195). After considering further briefing and oral argument, the trial court affirmed that its October 6, 2006 order was vacated in total. (CP 1143-1145.) OMI's subsequent Motion for Discretionary Review of the vacation order to the Court of Appeals was also denied. (CP 545-556.)

The trial court had ample legal authority to vacate. CR 60(b)(6) allows for vacation of a judgment where it "is no longer equitable that the judgment should have prospective application." *Gustafson v. Gustafson*, 54 Wn. App. 66, 74, 772 P.2d 1031, 1036 (1989). CR 60(b)(11) allows the court to relieve a party from an order for any reason justifying relief from the operation of the judgment. *Treadwell v. Wright*, 115 Wn. App. 238, 251, 61 P.3d 1214, 1220 (2003). The granting of a motion to vacate a judgment is within the discretion of the Court and will not be reversed in the absence of manifest abuse of that discretion. *Gustafson* at 70. Discretion is abused if it is exercised on untenable grounds for untenable reasons. *Treadwell* at 249. The trial court also has the discretion to review and revise rulings prior to the entry of final judgment. *See* CR 54(b); *Snyder v. State*, 19 Wn. App. 631, 636, 577 P.2d 160 (1978) (the court has wide discretion and authority to change, modify, revise, or eliminate orders at any time before final judgment).

The trial court properly vacated its October 6, 2006 order after discovery revealed that Wellman's tenders and OMI's suit were utterly baseless. OMI offers no authority or argument that the trial court abused its discretion in vacating its October 6, 2006 order.

In denying OMI's Motion for Discretionary Review, the Court of Appeals left the duty to defend issue to the trial court: "More likely, the

trial court will consider further briefing and argument and decide the legal issue whether Hartford breached its duty to defend." (CP 552-553.)

On June 28, 2008, OMI filed its motion for partial summary judgment regarding Hartford's alleged contractual duty to defend Wellman in *Buchholz* and *State Farm*. (CP 1032-1042). On September 12, 2008, the trial court entered an order based solely on the complaint that Hartford had a contractual duty to defend Wellman in *Buchholz*, but not *State Farm*. (CP 953-955.) Thereafter, on September 3, 2010, OMI filed a motion for revision of the trial court order that Hartford did not have a duty to defend the *State Farm* matter (CP 558-609), which was properly denied. (CP 376-378).

OMI was afforded multiple opportunities to argue Hartford's alleged duty to defend before the trial court and the trial court's final orders are now before this Court. The trial court did not abuse its discretion in vacating its October 6, 2006 Order in total.[9]

C. The Trial Court Granted OMI's Motion Re: Hartford's Duty to Defend in *Buchholz*

On September 12, 2008, the trial court entered an order that Hartford had a duty to defend Wellman in *Buchholz*. (CP 953-955.) The trial court's Order is the subject of Hartford's cross-appeal. Hartford

[9] OMI's claims were subsequently dismissed on alternative grounds, including the absence of duty to defend damages, and any alleged error would be harmless.

incorporates the points and authorities in its cross-appeal below in response to OMI's argument that Hartford breached its contractual duty to defend in *Buchholz*. Further, as discussed in Section J.1. below, OMI's breach of contract/duty to defend claim was subsequently dismissed on the alternative grounds of the absence of any damages, an essential element of a breach of contract claim. (CP 68-70.)

D. OMI's Breach of Contract/Duty to Defend Claim Re: State Farm Was Properly Dismissed

The duty to defend arises at the time a complaint is first brought implicating the insured's potential for liability. *Truck Insurance Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276, 281 (2002). The key is whether the allegations in the complaint, if proven true, would require the insurer to pay out on the policy. *Kirk v. Mt. Airy Insurance Company*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998).

The Hartford OCP policy is not a plenary CGL Policy providing broad liability coverage for Wellman.[10] Hartford's OCP policy unambiguously limits coverage and defense for Wellman to "property damage" arising solely out of Otis' elevator work or Wellman's supervision thereof. (CP 1491-1513.)

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[10] Contrary to OMI's assertion, Hartford did not concede that the "property damage" and "occurrence" requirements were met by the allegations in the *State Farm* complaint. Hartford stated that "***assuming*** there was an 'occurrence' and 'property damage,' certain exclusions to the policy would still preclude coverage." (CP 536-539.)

Paragraph 3.2 of the *State Farm* complaint alleges that there were "substantial delays in the construction of the Olympic Condominium by Wellman and substantial defects in the work performed by Wellman in the construction of the Olympic Condominium"; paragraph 4.2 alleges damages in amount to be determined at trial due to Wellman's breach of contract; and paragraph 5.2 alleges damages in amount to be determined at trial due to Wellman's breach of warranty. (CP 1579-1583.) No elevator-related claims were pled. Hartford did not agree to provide coverage or defense beyond the scope of the OCP policy and there is no duty to defend where the complaint does not allege an "occurrence" (*i.e.*, accidental construction defects) causing "property damage" (i.e., physical injury to tangible property or loss of use) arising from Otis' work. (*Id.*)

In comparing the language of Hartford's OCP policy to the allegations in the *State Farm* complaint, there are no allegations that, if proven true, would trigger Hartford's duty to defend under its limited OCP policy. *Kirk* at 561; *R.A. Hanson Co., Inc. v. Aetna Ins. Co.*, 26 Wn. App. 290, 293, 612 P.2d 456 (1980). The general mention of "construction defects" is insufficient. The complaint simply does not allege or infer any "property damage" arising out of Otis's product or work. A bare allegation of general damage, with no factual allegations suggesting "property damage" related to the Otis elevator, does not trigger coverage

and a duty to defend under Hartford's specialized policy. The trial court properly ruled that the *State Farm* complaint allegations did not trigger a duty to defend under Hartford's OCP policy.

The most disturbing aspect of Wellman's *State Farm* tender is that Wellman and OMI tendered to Hartford knowing that there were no elevator-related claims at the Project. On August 17, 2004, 13 months after the filing of the *State Farm* complaint and 21 months after the publication of ERD report confirming the absence of any elevator claims, OMI's senior claims adjuster, Jim Rumpee, directed Mr. Chmelik to "aggressively pursue" Hartford and file an action for bad faith if necessary. (CP 1322.) Mr. Rumpee admitted that he did not conduct any investigation regarding Hartford's coverage obligations prior to directing Mr. Chmelik to "aggressively pursue" Hartford. (CP 1243-1244.) Following OMI's irresponsible directions, Mr. Chmelik, on behalf of Wellman, tendered the *State Farm* matter under Hartford's OCP policy. (CP 1585-1587.)

Mr. Wellman knew of no defects or damages caused by Otis' work, but testified that the *State Farm* matter was tendered to Hartford "because it was standard." (CP 1287-1288.) "Because it was standard" is not a good faith and sufficient basis for tendering a claim with no knowledge of defects resulting in "property damage" triggering a defense

obligation. Based upon a reading of the limiting language in the OCP policy and the lack of allegations in the complaint regarding the elevator, Hartford never had a duty to defend Wellman in *State Farm*. Wellman and OMI tendered anyway. The tenders were nothing more than an attempt to manufacture coverage and bad faith claims. The trial court's orders should be affirmed.

E. <u>OMI's Bad Faith and CPA Claims Were Properly Dismissed</u>

OMI's bad faith and CPA claims were properly dismissed based upon Wellman's and OMI's misrepresentations and bad faith conduct in pursuing coverage from Hartford. OMI attempts to distract this Court by reciting Washington law regarding an insurer's duty to defend and bad faith. Such arguments are not relevant and do not address the issues presented to the trial court. OMI offers no argument appealing the basis of the trial court's orders. The issues presented in Hartford's motions was whether *plaintiff's* misrepresentations precluded its bad faith and CPA claims under existing law. The alleged conduct of Hartford was not material to the motions.

When an insured makes material misrepresentations regarding a claim for insurance coverage, any claim by the insured against the insurance company for bad faith and CPA violations must fail. *Kim v. Allstate Insurance Company, Inc.*, 153 Wn. App. 339, 356, 223 P.3d 1180

(2010);[11] *See also Wickswat v. Safeco Ins. Co.*, 78 Wn. App. 958, 904 P.2d 767 (1996) (an insured who makes false representations is not entitled to bring a CPA or bad faith claim). A misrepresentation is material if it involves a fact that is relevant to a claim or investigation of a claim. *Kim* at 354-355. Materiality is determined from the standpoint of the insurer, not the insured. *Id.* at 355. The insured's bare assertion that it did not intend to deceive the insurance company is not credible evidence of good faith and, in the absence of credible evidence of good faith, the presumption warrants a finding in favor of the insurer. *Id.* at 356. OMI's/Wellman's misrepresentations regarding its claims for coverage were material to Hartford in that Wellman was seeking benefits under Hartford's policy. OMI sued Hartford knowing the predicate facts of elevator damages were absent. The trial court's dismissal orders were correct.

There was a 12-month delay between the filing of the *Buchholz* complaint and Wellman's tender to Hartford. (CP 1515-1524, 1309.) The ERD report exonerating Otis of any potential liability was published on November 4, 2002, more than 60 days prior to Wellman's tender to Hartford on January 9, 2003 for the *Buchholz* matter. (CP 1539-1572.)

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[11] Hartford anticipates that OMI will argue that *Kim* is inapposite because it involved first party coverage. Misrepresentations by an insured to an insurer are not forgiven by the fact that the misrepresentations were made in the third-party context.

There was a 13-month delay between the filing of the *State Farm* complaint on July 21, 2003 and Wellman's tender to Hartford on August 19, 2004. (CP 1579-1583 and 1585-1587.) The ERD report was published on November 4, 2002, 21 months prior to Wellman's tender to Hartford on August 19, 2004 for the *State Farm* matter. (CP 1539-1572.) The subsequent *Buchholz* and *State Farm* tenders were thus misrepresentation by both Wellman and OMI. They made claims knowing they were groundless and false.

Wellman's representatives and OMI confirmed that they knew prior to tendering to Hartford that there were no elevator-related claims. Mr. Wellman testified that Wellman itself investigated defect claims at the project prior to the filing of the complaints; that there were no discussions during the pre-litigation investigation of defects or damages regarding the elevator; and that there were no elevator claims at any time. Wellman's corporate counsel, Mr. Chmelik, incredibly does not have a custom or practice of reviewing the contracts or insurance policies prior to tendering claims to or suing insurance companies on behalf of his clients and was not even in possession of Hartford's OCP policy when he tendered to Hartford. OMI's senior claims adjuster, Mr. Rumpee, admitted that he conducted no investigation prior to directing Mr. Chmelik to "aggressively pursue" Hartford and file a bad faith suit. This was irresponsible behavior.

The tenders with knowledge that there were never any elevator-related claims and the narrow coverage afforded by Hartford's OCP policy establish that Wellman's tenders were material misrepresentations to Hartford. OMI did not, and cannot present any evidence to the contrary. OMI offers no facts or legal authority or argument to avoid the holding in *Kim v. Allstate Insurance Company* that an insured's misrepresentations preclude bad faith and CPA claims. The trial court's ruling dismissing OMI's bad faith and CPA claims should be affirmed.

F. <u>OMI's Motion Re: "Harm" Was Properly Denied</u>

On June 8, 2007, the trial court properly denied OMI's motion for partial summary judgment on the issue of "harm" from Hartford's alleged bad faith. (CP 1221-1223.) An essential element of a bad faith claim is that the alleged wrongful act caused "harm". *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). A rebuttable presumption of harm/prejudice is imposed once the insured establishes bad faith. *Id.* at 390. The insurer can rebut the presumption by showing that its acts did not harm or prejudice the insured. *Id.* at 394.

The undisputed facts clearly establish that Hartford rebutted any of presumption prejudice and/or harm.[12] No act or omission by Hartford was

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[12] OMI cherry-picks and emphasizes the statement in *Mutual of Enumclaw v. Dan Paulson Construction*, 161 Wn.2d 903, 921, 169 P.3d 1 (2007) that the presumption of harm imposes "an almost impossible burden of proof" on the insurer. *Id.* at 921-

detrimental to the defense of Wellman as evidenced by the unexplained delays in tendering to Hartford and the fact that Wellman [and OMI] knew prior to tendering to Hartford that there were no elevator-related claims. There is no argument or evidence that any act or omission by Hartford ever jeopardized Wellman's business or interfered with its ongoing defense. Wellman never lost control of the case. Wellman's first groundless tender was not sent to Hartford until 12 months after the filing of the *Buchholz* complaint.

The Hartford policy has very narrow coverage unambiguously limiting coverage to damages solely arising out of Otis' product and work. There were no claims or actual damages connected to the elevator at <u>any time</u> in either suit and Wellman and OMI knew this prior to tendering to and suing Hartford. No portion of settlement funds or defense costs incurred by OMI were related to the elevator. OMI has not, and cannot produce any evidence that Wellman was harmed or prejudiced as a result of any act or omission by Hartford.

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922. The Supreme Court held that MOE did not rebut the presumption of harm where the insured produced evidence from the insured and counsel that MOE's subpoena and ex parte contact with the arbitrator harmed/prejudiced the insured by causing significant uncertainty and increased risk for the insured's defense, interfered in hearing preparation, interjected insurance coverage issues into the arbitration, and potential prejudicing of the arbitrator. *Id.* at 922-923. Here, the facts surrounding Wellman's/OMI's knowingly baseless tenders and absence of any defense or indemnity costs incurred establish that no alleged act or omission by Hartford prejudiced or harmed Wellman. Hartford effectively rebutted any presumption of harm or prejudice.

The un-refuted evidence placed before the trial court by Hartford rebutted any presumption of harm even assuming bad faith. The complaint was pretextual. The trial court's denial of OMI's motion for partial summary judgment on the issue of "harm" should be affirmed.[13] Moreover, the trial court vacated its bad faith order, making a damages presumption moot.

G. OMI's Claim for Estoppel Into Coverage was Properly Dismissed

On August 8, 2008, the trial court denied OMI the remedy of estoppel into coverage. (CP 956-958.) OMI pled the equitable remedy of

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[13] This Court's holding in *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Insurance Co.*, 150 Wn. App. 1, 206 P.3d 1255 (2009) is on point. Ledcor sued MOE for bad faith for failing to promptly accept Ledcor's tender of defense as an additional insured under its subcontractor Zanetti's policy. This Court declined to award Ledcor damages for MOE's bad faith because Ledcor failed to prove harm. *Id.* at 9. MOE rebutted any presumption of harm.

Ledcor establishes that bad faith claims are properly dismissed in the absence of any recoverable damages/harm and that the remedy for bad faith is compensation only for the actual harm caused. *Ledcor* at 10-11. This Court affirmed the trial court's finding that Ledcor was only entitled to indemnification under Zanetti's policy for liability caused by Zanetti's work and that Ledcor ultimately received what the policy entitled it to in the form of an indemnity payment on behalf of Zanetti and, thus, suffered no harm due to MOE's failure to timely accept tender and defend. *Id.* This Court held that MOE's failure to timely accept tender made no difference in the outcome; that Ledcor suffered no harm resulting from MOE's breach; and the trial court did not err in awarding no damages for bad faith. *Id.* at 10-11. In determining that Ledcor suffered no harm, this Court relied on the facts that Ledcor was represented at all times before and after its tender to MOE by competent counsel and that there was no evidence the MOE's involvement might have achieved a different end result. *Id.* at 11.

Here, considering Hartford's OCP policy and the absence of any defects or damages caused by Otis' work, Wellman was not entitled to any coverage or benefits under Hartford's policy. Wellman suffered no harm due to Hartford alleged bad faith failure to defend (based upon the complaints) and it made no difference in the outcome. Plaintiff has produced no evidence to the contrary.

"estoppel" into coverage. (CP 1792-1804.) A party claiming estoppel must have proceeded in good faith and with clean hands. *Mutual of Enumclaw v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988); *see also Christman v. General Constr. Co.*, 2 Wn. App. 364, 467 P.2d 867, *petition for review denied*, 78 Wn.2d 994 (1970) (estoppel is available to innocent parties only). Wellman and OMI were not innocent parties. A party claiming estoppel must have proceeded in good faith and with "clean hands"; and a person may not base a claim of estoppel on conduct, omissions, or representations induced by his own conduct, concealment, or representations. *Cox* at 650-651. The "clean hands doctrine" provides that one who comes into equity must come with clean hands. *J.L. Cooper & Company v. Anchor Securities Company*, 9 Wn.2d 45, 71, 113 P.2d 845 (1941); *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940). A person may, by his misconduct, be precluded from recovering in equity. *Id.* The trial court properly applied the doctrine and denied an estoppel remedy.

Insurance contracts carry an obligation by the parties to deal with each other in good faith. This is a reciprocal duty borne by the insured *and* insurer. *See* RCW 48.01.030[14]; *Pemco v. Kelly,* 60 Wn. App. 610,

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[14] RCW 48.01.030 provides:

619, 805 P.2d 822 (1991). Both insurer and insured, having entered into an insurance contract, are bound by the common law duty of good faith and fair dealing, as well as the statutory duty "to practice honesty and equity in all insurance maters." *Mahler v. Szucs*, 135 Wn.2d 398, 413, 957 P.2d 632 (1998). An insured's duty of good faith extends to its representatives, i.e., its attorney. *See* RCW 48.01.030. OMI by assignment stepped into the shoes of Wellman and is bound by the statute as well.

OMI attempts to distract this Court from the specific issue on appeal (i.e., Wellman's/OMI's unclean hands) by focusing on Hartford's alleged breach of the duty to defend a spurious complaint.[15] Such arguments are not relevant and do not address the issue presented to the trial court, *i.e.*, whether *OMI's and Wellman's* unclean hands precludes the estoppel remedy. OMI offers no argument appealing the basis of the trial court's order.

> 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. Upon the insurer, ***the insured, and their representatives*** rests the duty of preserving inviolate the integrity of insurance.

(Emphasis added.)

[15] OMI cites *Truck Ins. Exchange v. VanPort Home, Inc.*, *Kirk v. Mt. Airy Ins. Co.*, and *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992). The doctrine of "unclean hands" was not at issue in the cases cited by OMI.

The doctrine of "unclean hands" is a complete defense to OMI's claim for estoppel into coverage. OMI's allegations against Hartford are irrelevant to the dismissal of OMI's estoppel claim based upon OMI's/ Wellman's "unclean hands" in pursuing unfounded coverage from Hartford.

OMI erroneously states that Hartford's unclean hands motion was based solely on the ERD report. Hartford's motion was based upon the ERD report and the totality of testimony of witnesses, including Mr. Chmelik, Mr. Wellman, Mr. Schroeder, Mr. Rumpee, and Wellman's defense attorney, Dino Vasquez. (CP 1123-1142). As discussed, Mr. Wellman agreed that coverage for Wellman under Hartford's policy was limited to damage from Otis' work and that there were no allegations of such defects or damages at anytime. Mr. Chmelik does not have a custom or practice of reviewing the contracts or insurance policies prior to tendering claims to insurance companies and was not even in possession of Hartford's OCP policy when he tendered to Hartford. Mr. Shroeder testified that there were no allegations in the complaint regarding Otis or the elevator. Mr. Rumpee ordered a lawsuit without investigation or foundation. This litigation should not have been commenced.

Mr. Rumpee, the OMI individual orchestrating pursuit of coverage and bad faith claims against Hartford, testified that he never reviewed

Hartford's OCP policy, never reviewed Otis' scope of work, never reviewed any expert reports, had no knowledge of defects or damages regarding the installation of the elevator, never analyzed the scope of coverage for Wellman under Hartford's policy, had no knowledge regarding Hartford's investigation of Wellman's tenders, and did not conduct any investigation before directing Mr. Chmelik to "aggressively pursue" Hartford. OMI is an insurer doing business in Washington and has heightened knowledge concerning the bringing of a coverage action. As a carrier, its acts were especially egregious.

No one on the plaintiff side of this case can articulate a factual or good faith basis for the pursuit of coverage from Hartford. There was no inquiry or reasonable investigation regarding the scope of coverage for Wellman under Hartford's OCP policy prior to the untimely and unfounded tenders and suit. A simple good faith review of Otis' subcontract, Hartford's OCP policy, and the alleged defects would have confirmed the falsity of tendering the claims to Hartford. Equity and good faith required that minimal diligence. Wellman's and OMI's tenders were misrepresentations, made in bad faith, were irresponsible, and with unclean hands, which precludes the imposition of any equitable remedy, including estoppel into coverage. The trial court's ruling in all respects should be affirmed.

H. The Trial Court Properly Dismissed OMI's CPA Claim

OMI's Brief focuses on Hartford's alleged violations of Washington's Insurance Regulations [WAC 284.30 *et seq.*] and the CPA. The focus of Hartford's dismissal motion granted by the trial court was *OMI's* conduct. (CP 617-789 and CP 384-399). Hartford's alleged conduct was not at issue in Hartford's motion to dismiss OMI's bad faith and CPA claims and any such arguments by OMI are irrelevant and do not address the issue decided by the trial court. OMI offers no substantive evidence to overturn the trial court dismissal order. The points and authorities set out in Section E above apply equally to OMI's appeal of the order dismissing OMI's CPA claim and are hereby incorporated as though set forth fully herein. The CPA claim was properly dismissed.

I. OMI's Contribution Claim Was Properly Dismissed

On April 30, 2009, Hartford filed its motion for summary judgment dismissal of OMI's remaining claims, including OMI's contribution claim, based, in part, upon the absence of any actual damages. (CP 854-870). OMI argued in opposition that Hartford's motion should be denied because Hartford breached its duty to defend Wellman in the *Buchholz*; there were issues of fact regarding breach of contract damages; OMI had a right to try its bad faith, CPA, and negligence claims; and Hartford committed procedural bad faith. (CP

811-823). OMI actually offered no opposition briefing or argument to Hartford's motion to dismiss OMI's contribution claim. (CP 811-823).

OMI now attempts to cure its failure to oppose Hartford's motion to dismiss its contribution claim by arguing that "the trial court dismissed Oregon Mutual's contribution claim, *apparently* based on Hartford's argument that Wellman was not damaged by its failure to defend because there was no evidence of property damage caused by Otis' work." (*See* Brief of Appellant, pp. 39-40 (emphasis added).) Hartford specifically requested the trial court to dismiss OMI's contribution claims based upon OMI's non-opposition. (CP 791.) Where the non-moving party [OMI] fails to make a showing sufficient to establish the existence of an element of that party's case, and on which that party bears the burden of proof at trial, then summary judgment should be granted. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Here, OMI made no showing supporting its contribution claim against Hartford and the claim was properly dismissed.

OMI's contribution claim also fails on the merits. A claim for contribution between carriers exists where they are jointly and severally liable for an underlying claim. *American National Fire Ins. Co. v. B&L Trucking and Construction Co.*, 134 Wn.2d 413, 422, 951 P.2d 250 (1998). Joint and several liability is appropriate where each insurer agreed

to pay *"all sums"* which the insured shall become legally obligated to pay as damages because of property damages. (*Id.*) However, where insurance covers only a limited risk of a particular party and loss occurs, the insurer with the limited risk is only liable for the limited risk insured. *Kirkland v. Ohio Casualty Insurance Co.*, 18 Wn. App. 538, 547, 569 P.2d 1218, 1224 (1977). For example, an insurer of a project subcontractor involved in a construction defect suit is not liable for damages and/or defense fees and costs unrelated to the insured subcontractor's work. *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.,* 150 Wn. App. 1, 11, 15, 206 P.3d

Hartford and OMI did not insure the same scope of risks. OMI insured Wellman under a broad CGL policy, whereas Hartford's OCP policy limits coverage for Wellman to property damage arising solely out of Otis' elevator. Hartford did not agree to provide coverage or pay for damages beyond the scope of its OCP policy. Lastly, at no time has there ever been any evidence of an "occurrence" or "property damage" or defense costs associated with the elevator supporting a contribution claim against Hartford by OMI. OMI did not pay to settle an elevator-related claim for which it could claim contribution. No defense fees were incurred by OMI associated with the elevator.

J. OMI's Breach of Contract and Negligence Claims Were Properly Dismissed

1. OMI's Breach of Contract Claim

The trial court erred in entering its initial September 12, 2008 Order that Hartford breached its contractual duty to defend Wellman in *Buchholz*. (CP 953-955.) However, the trial court thereafter properly dismissed OMI's breach of contractual duty to defend claim on alternative grounds, *i.e.*, the absence of any recoverable damages, an essential element of any breach of contract (or tort) claim. (CP 68-70.)

A breach of contract is actionable only if the contract imposes a duty, the duty is breached, **and the breach proximately causes damages to the claimant**. *Northwest Independent Forest Manufacturers v. Department of Labor & Industries*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (emphasis added). Damages are an essential element of a breach of contract claim. The general rule governing damages for breach of contract is that the aggrieved party should be in the same economic position it would have obtained had the contract been performed. *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 764, 115 P.3d 349 (2005).

Hartford's limited OCP policy expresses the parties' intent that coverage and any defense obligation be limited to claims of "property damage" arising out of Otis' work. Hartford was only contractually obligated to defend Wellman for claims and pay defense costs related to

Otis' elevator. Plaintiff's key witnesses, including Mr. Wellman and his defense attorney, Mr. Vasquez, admitted that there were never any defects or damages related to the Otis elevator. There is simply no evidence of any defense fees and costs related to Otis or the elevator and there is no basis for recovery of any of the underlying defense fees and costs from Hartford.[16] (CP 227-229.) There is no record evidence of any other "harm."

This Court's ruling in *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.,* 150 Wn. App. 1, 206 P.3d 1255 (2009), confirms that OMI's breach of contract/ duty to defend claims were properly dismissed based upon the absence of any recoverable damages. This Court affirmed the trial court's award of defense costs against MOE using a two step process by first determining the percentage of the damages attributable to subcontractor Zanetti's work by comparing the Zanetti settlement with Ledcor ($236,000) to Ledcor's settlement with the developer ($1.25 million). *Ledcor* at 15. It was determined 18.8% of Ledcor's settlement with the developer was attributable to Zanetti's work ($236,000/$1.25 million). *Id.* The court then applied 18.8% to the total defense costs

[16] A defendant may move for summary judgment by simply pointing out the absence of evidence supporting the plaintiff's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a non-moving party fails to make a showing sufficient to establish the existence of an element of that party's case on which that party bears the burden of proof at trial, summary judgment should be granted. *Young* at 225.

submitted by Ledcor ($541,877.77) and awarded Ledcor defense costs totaling $101,873.02. *Id.* Here, there are **no** damages or settlement amounts attributable to Otis. A comparison of the damages attributable to Otis' work to the *Buchholz* settlement ($0.00/$75,000) is 0%. Applying the percentage (0%) to defense costs alleged by OMI results in a defense cost award of $0.00. There are no recoverable damages based upon Hartford's alleged breach of contract/ duty to defend.

Hartford has no liability under its OCP Policy for non-elevator-related defense costs and OMI's cause of action for breach of contract/ duty to defend was properly dismissed based upon the absence of any such damages, an essential element of a breach of contract claim.

2. OMI's Negligence Claim

To prevail on its negligence claim, OMI must prove (1) duty, (2) breach, (3) causation, and (4) damages. *Dombrosky v. Farmers Insurance Company of Washington*, 84 Wn. App. 245, 261, 928 P.2d 1127, 1136 (1997). Damages are an essential element of an action for an insurer's negligent handling of the defense of a claim. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499, 503 (1992). OMI's negligence claim required it to prove that Wellman suffered actual damages from any act or omission by Hartford in denying Wellman's tenders of defense, *i.e.*, indemnity or defense costs related to Otis or the elevator.

As discussed in Section J.1. above and incorporated fully herein, there is no evidence of any act or omission by Hartford causing actual recoverable damages to OMI. OMI has never produced any evidence of a single dollar being spent on the investigation, defense, or settlement of claims connected or related to the elevator. OMI's negligence claim was properly dismissed. It was groundless.

K. Hartford Has No Obligation for Defense Costs

OMI incorrectly alleges that Hartford is liable for 100% of the non-elevator-related *Buchholz* defense costs and that Hartford cannot limit its defense obligation to amounts related to Otis' work. Washington law does not force insurers to pay for losses they never contracted to insure. *Polygon Northwest Company v. American National Fire Insurance Company*, 143 Wn. App. 753, 775, 189 P.3d 777 (2008). The contours of an insurer's coverage obligations are defined by the specific language of the insurance contract interacting with the type of loss suffered by the insured. *Id.* This Court held in *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.* that an insurer of a project subcontractor involved in a construction defect suit is not liable for damages and/or defense fees and costs unrelated to the subcontractor's work. *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.,* 150 Wn. App. 1, 11, 15, 206 P.3d 1255

(2009). Otis similarly was a subcontractor to Wellman and Hartford and was not liable for damages unrelated to the elevator.

Hartford's policy does not insure the entire project or defect claims unrelated to Otis. OMI ignores the limiting language in Hartford's policy and this Court's ruling in *Ledcor v. Mutual of Enumclaw.* Instead, OMI cites *Groul Construction Company, Inc. v. Insurance Company of North America*, 11 Wn. App. 632, 524 P.2d 427 (1974) and *American National Fire Insurance Co. v. B&L Trucking and Construction Co., Inc.*, 134 Wn.2d 413, 951 P.2d 250 (1998). *Groul* and *B&L Trucking* are, however, inapposite. The policies at issue in *Groul* and *B&L Trucking* were broad CGL polices (not limited OCP policies) and insured the same "all sums" liability risks. In *Groul*, Groul Construction Company was sued for progressive damage caused by dry rot to the foundation of an apartment building caused by defective backfilling. *Groul* at 633. Groul tendered its defense to its CGL carriers (Safeco, INA, and Northwestern) who refused to defend. Groul settled the claim and sued its carriers for breach of contract. *Id.* The trial court entered judgment against all three carriers finding them jointly and severally liable for the amount of the settlement. *Id.*

The instant case is distinguishable. First, the alleged construction defects at the Project did not arise out of a single injury such as dry rot.

There were alleged construction defect damages caused by multiple conditions (none of which were related to the elevator.) Second, OMI and Hartford did not insure the same scope of risks. Hartford's OCP policy limited coverage and any defense obligation to property damage arising solely out of Otis' scope of work in installing an elevator.

B&L Trucking is also distinguishable. The Supreme Court's ruling was based upon the specific "all sums" language in the insurance policies at issue. *B&L Trucking* at 422 and 428-430. Hartford's OCP policy does not contain "all sums" language. This Court addressed *B&L Trucking* in *Polygon Northwest Company v. American National Fire Insurance Company*, 143 Wn. App. 753, 189 P.3d 777 (2008), an insurance coverage action arising out of a construction defect case, and reiterated Washington law that insurers are not forced to pay for costs they never contracted to insure. *Polygon* at 789. This Court held that "*B&L* expressly does *not* stand for the proposition that an insurer may be held liable for damages that it has not contracted to insure." *Id.* at 776. Hartford is not jointly and severally liable for any *Buchholz* (or *State Farm*) defense based upon the absence of any defense costs related to non-existent elevator claims and the difference in the risks insured.

OMI further alleges that Hartford must pay all *Buchholz* defense costs arguing there is no reasonable basis for allocating defense costs

between covered and non-covered items. It is easy to allocate the defense costs between covered and non-covered claims under Hartford's OCP policy. There were never any covered defense costs and/or damages related to Otis or the elevator. Hartford is not jointly and severally or proportionately liable for defense costs paid by OMI for non-existent elevator claims under its limited OCP policy.

L. OMI's Olympic Steamship Claim Was Properly Dismissed

OMI claims attorney's fees and costs incurred in this litigation under *Olympic Steamship Company, Inc. v. Centennial Insurance Company*, 117 Wn.2d 37, 811 P.2d 673 (1991). (CP 1792-1804). Under *Olympic Steamship*, an award of attorney's fees is allowed where the insurer compels the insured to assume legal action to obtain the full benefit it its insurance contract. *Olympic Steamship* at 53. *Olympic Steamship* established an equitable exception to the American Rule on attorney fees allowing an award of fees to an insured who successfully sues an insurer to obtain insurance coverage. *McRory v. Northern Insurance Company of New York*, 138 Wn.2d 550, 554, 980 P.2d 736 (1999); *McGreevy v. Oregon Mutual Insurance Company*, 128 Wn.2d 26, 34-35, 904 P.2d 731 (1995).

Olympic Steamship fees are an equitable remedy. "Unclean hands" is a complete defense to all equitable claims. *Cox* at 650-651. For

brevity, Hartford incorporates the equally applicable points and authorities in Section G above precluding plaintiff from the remedy of equitable estoppel as though set forth fully herein. As with the remedy of estoppel into coverage, Wellman's and OMI's "unclean hands" precludes the imposition of the equitable remedy of *Olympic Steamship* fees and costs. OMI brought a baseless, bad faith, and frivolous lawsuit. The trial court, once it recognized this fact, denied all equitable remedies.

M. <u>OMI's Request for Fees and Expenses on Appeal Should be Denied</u>

As discussed, the trial court's rulings should be affirmed. Because OMI is not entitled to fees under *Olympic Steamship*, the CPA, or otherwise, OMI may not recover them on appeal. *Ledcor Industries, Inc. v. Mutual of Enumclaw Ins. Co.* at 16.

N. <u>OMI's Appeal Violates CR 11</u>

Plaintiff's filing and pursuit of this appeal violates CR 11. The purpose of CR 11 is to assure the truthfulness of pleadings and to discourage claims without merit. *Griffith v. Bellevue,* 130 Wn.2d 189, 194, 922 P.2d 83 (1996). OMI should have abandoned this case after losing in the trial court and after the baselessness of its suit was uncovered. Sanctions may be imposed if three conditions are met: (1) the action is not well grounded in fact; (2) it is not warranted by law; and (3) the attorney signing the pleading has failed to conduct a reasonable

inquiry in the factual and legal basis of the action. *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 754 P.2d 1243 (1988). A filing is baseless if it is not well grounded in fact or its is not warranted by existing law or a good faith argument for an alternation of existing law. *Madden v. Foley*, 83 Wn. App. 385, 922 P.2d 1364 (1996). Pleadings lack merit if they are factually or legally frivolous and a competent attorney, after reasonable inquiry, could not form a reasonable belief that the pleading was well grounded in fact. *Cascade Bridge v. Economic Dev. Bd.*, 61 Wn. App. 615, 811 P.2d 697 (1991). Appellate actions should be no exception. A party or an attorney or both may be assessed litigation expenses, including reasonable attorney's fees, for violating CR 11. *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 754 P.2d 1243 (1988). Hartford seeks these sanctions.

For the reasons discussed in detail above, OMI's appeal, like its tenders and suit against Hartford, is not grounded in fact or warranted by law or brought in good faith. There were never <u>any</u> claims or alleged damages related to the Otis elevator validating the tenders or suit against Hartford. The decisions of the trial court placed OMI on notice of its bad faith litigation tactics. Hartford should be awarded its fees and costs on appeal.

HARTFORD'S CROSS-APPEAL

I. ASSIGNMENTS OF ERROR RE: CROSS-APPEAL

1. Notwithstanding its alternate dismissal of the claim on other grounds, the trial court erred in entering its September 12, 2008 Order that Hartford had a contractual duty to defend Wellman in *Buchholz* based upon a reading of the *Buchholz* complaint.

2. The trial court erred in denying Hartford's motion for revision of the trial court's September 12, 2008 Order that Hartford had a duty to defend Wellman in the *Buchholz* matter, considering the trial court's rulings that OMI and Wellman misrepresented claims for coverage to Hartford and acted in bad faith and with "unclean hands".

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Hartford had a duty to defend Wellman under an Owners and Contractors Protective Liability ("OCP") policy which unambiguously limits coverage and defense to claims of "property damage" arising out of Otis Elevator's elevator installation or product where the complaints made no reference to an elevator or Otis' work?

2. Whether the trial court abused its discretion by not vacating and reversing its Order that Hartford had a contractual duty to defend Wellman in the *Buchholz* matter after previously finding that Wellman's

tenders were material misrepresentations of coverage and made with unclean hands?

3. Whether there can ever be a breach of the duty to defend claims ultimately proven false based upon tender misrepresentations and bad faith pleadings?

III. STATEMENT OF CASE

Hartford incorporates its Counter-Statement of the Case set forth in Section II of its Response Brief and provides the following:

On June 27, 2008, OMI filed its motion for partial summary judgment regarding Hartford's alleged contractual duty to defend Wellman in the *Buchholz* matter. (CP 1032-1042.) On July 23, 2008, Hartford filed its opposition and counter-motion for partial summary judgment regarding the duty to defend. (CP 1009-1031.) On September 12, 2008, the trial court entered an Order that Hartford had a contractual duty to defend Wellman in *Buchholz* based solely upon a reading of the complaint. (CP 953-955.)

On August 30, 2010, Hartford filed a motion to dismiss OMI's Bad Faith and CPA claims based upon Wellman's and OMI's material misrepresentations that there was coverage under Hartford's OCP policy. (CP 617-789.) On October 1, 2010, the trial court dismissed OMI's Bad Faith and CPA claims based upon Wellman's and OMI's material

misrepresentations in tendering and pursuing coverage under Hartford's OCP policy. (CP 373-375.)

On January 21, 2011, Hartford filed a motion for revision of the trial court's original September 12, 2008 Order that Hartford had a contractual duty to defend Wellman in *Buchholz* based upon the trial court's subsequent ruling that OMI and Wellman misrepresented claims for coverage to Hartford. (CP 143-155.) On February 4, 2011, the trial court denied Hartford's motion for revision of the trial court's September 12, 2008 Order. (CP 71-72.)

IV. ARGUMENT

A. Standard of Review

A summary judgment order is reviewed *de novo*. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 64 P.3d 22 (2003).

B. Hartford Did Not Breach Its Duty to Defend

The duty to defend arises at the time an action is first brought and is based upon the insured's potential for liability based upon the complaint. *Truck Insurance Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276, 281 (2002). The key consideration in determining whether the duty to defend has been invoked is whether the allegations in the complaint, if proven true, would require the insurer to pay out on the policy. *Kirk v. Mt. Airy Insurance Company*, 134 Wn.2d 558, 561, 951

P.2d 1124 (1998). An insurance company's determination of a defense obligation is made from the allegations in the complaint and the terms of the insurance policy. *Scottish & York International Insurance Group v. Ensign Insurance Company,* 42 Wn. App. 158, 160, 709 P.2d 397, 398 (1985). Hartford's OCP policy is highly restricted and only provides coverage and defense for "property damage" arising out of the product or operations performed by Otis for Wellman at the Project. The complaint is completely silent about an elevator or related defects or damages. There is no reference at all to an elevator. If everything in the complaint was proven true, Hartford would not have any obligation to pay.

Paragraph 1.12 of the *Buchholz* complaint alleged in pertinent part that "Defendant Wellman & Zuck breached the construction contract and its warranty by (1) failing to provide work that was free from defect...." (CP 1515-1524.) Paragraph 1.13 of the Complaint alleged that "as a direct and proximate result of the breach of contract as aforestated, the building located at 1301 West Holly Street and condominiums common spaces therein have suffered severe and significant water damage which require repair." (*Id.*) Thereafter, the complaint alleges very detailed and specific construction defects and damages related to the installation of siding, installation of vinyl covering applied to decks, failure to install window coverings, failure to install landscaping, and for damages incurred in

repairing defective roofing and flashing. (*Id.*) The same specific defect allegations are reiterated in the prayer for judgment. (*Id.*) The complaint does not make **any** reference to Otis or its product; defects related to the elevator; or "property damages" arising out of the installation of the elevator. The trial court apparently drew inferences but they were not well taken.

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. The *Buchholz* complaint does not set forth any elevator-related allegations of property damage obligating Hartford to provide a defense under the narrow coverage provided by the OCP policy. The "occurrence" requirement is not satisfied because there are absolutely no allegations of construction defects in the complaint relating to Otis' work or Wellman's supervision thereof. Moreover, there are no allegations of third-party "property damage" caused by Otis or the installation of the elevator in the complaint triggering coverage.

Hartford's OCP policy is not a broad Commercial General Liability policy and does not respond without some concrete nexus to the elevator. Hartford's OCP policy did not apply when read in conjunction

with the complaint. Hartford did not breach its duty to defend the *Buchholz* matter and the trial court should be reversed. The trial court read too much into the complaint and failed to recognize the limits of Hartford's OCP policy.

C. An Insurer Does Not Have a Duty to Defend a Claim Based Upon Misrepresentations

On September 12, 2008, the trial court granted OMI's motion regarding Hartford's alleged duty to defend Wellman in *Buchholz* based upon the complaint. After subsequent discovery and further briefing and argument, the trial court precluded OMI from the remedy of equitable estoppel into coverage because of plaintiff's "unclean hands", and bad faith (CP 1123-1142, CP 956-958.) and dismissed OMI's bad faith and CPA claims based upon plaintiff's misrepresentations of coverage under Hartford's limited OCP policy. (CP 617-789 and CP 373-375.) Based upon the trial court's holding that Wellman's/OMI's tenders to Hartford were misrepresentations of coverage, Hartford filed a motion for revision of the trial court's September 12, 2008 Order that Hartford had a duty to defend Wellman in *Buchholz*. (CP143-155.) Hartford's motion was denied. (CP 71-72.)[17] The trial court has broad discretion and authority to

[17] The trial court may have thought its dismissal of OMI's claim for breach of contract/duty to defend based upon the absence of any actual damages mooted its original decision.

review and revise rulings prior to the entry of final judgment. *See* CR 54(b); *See also Schiffman v. Hanson Excavating Co., Inc.*, 82 Wn.2d 681, 687-688, 513 P.2d 29 (1973) (an order failing to qualify under [CR 54(b)] is subject to revision at any time prior to the entry of a final judgment adjudicating the entire action).

The trial court abused its discretion in not reversing its September 12, 2008 order that Hartford had a contractual duty to defend Wellman in *Buchholz* considering its findings that OMI/Wellman misrepresented its claims under Hartford's limited OCP policy, acted with unclean hands, and that there were no recoverable damages under any claim. There can be no contractual breach of the duty to defend a claim made with unclean hands and based upon misrepresentations.

An insured is precluded from maintaining bad faith and CPA claims against an insurer where the insured makes material misrepresentations regarding a claim for insurance coverage. *Kim v. Allstate Insurance Company, Inc.*, 153 Wn. App. 339, 356, 223 P.3d 1180 (2010). Hartford requests this Court to extend the ruling in *Kim* and hold that an insured that makes material misrepresentations and acts in bad faith and with "unclean hands" regarding a claim for insurance coverage is

also precluded from maintaining a claim for breach of the contractual duty to defend.

Respectfully submitted this 13th day of September, 2011.

FORSBERG & UMLAUF, P.S.

By: _____

John P. Hayes, WSBA #21009
Martin J. Pujolar, WSBA #36059
Attorneys for Cross-Appellant/Respondent
Hartford Fire Insurance Company

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing RESPONDENT/CROSS-APPELLANT'S MOTION FOR LEAVE TO FILE AN OVER-LENGTH BRIEF on the following individuals in the manner indicated:

Mr. Gary Sparling
Soha & Lang, P.S.
1325 Fourth Ave., Suite 2000
Seattle, WA 98101-2570
Facsimile: 206-624-3585
( ) Via U.S. Mail
( ) Via Facsimile
(X) Via Hand Delivery
( ) Via ECF

SIGNED this 13th day of September, 2011, at Seattle, Washington.

V.M. Waters
Veronica M. Waters