

66755-6-I

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COURT OF APPEALS  
 DIVISION I  
 STATE OF WASHINGTON

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OREGON MUTUAL INSURANCE COMPANY,  
 an Oregon corporation,

Plaintiff/Appellant/Cross-Respondent,

v.

HARTFORD FIRE INSURANCE COMPANY,

Defendant/Respondent/Cross-Appellant.

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**RESPONDENT/CROSS-APPELLANT HARTFORD FIRE  
 INSURANCE COMPANY'S REPLY BRIEF RE: CROSS-APPEAL**

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**TABLE OF CONTENTS**

A. The Trial Court Erred in Finding a Contractual Duty to  
Defend Wellman Given the Absence of Any Elevator-  
Related Allegations in the Buchholz Complaint..... 1

B. An Insurer Does Not Have a Duty to Defend a Claim Based  
Upon Misrepresentations ..... 10

## TABLE OF AUTHORITIES

### Cases

<i>Kim v. Allstate Insurance Company, Inc.</i> , 153 Wn. App. 339, 223 P.3d 1180 (2010).....	13, 14, 15, 16, 17
<i>Kirk v. Mt. Airy Insurance Company</i> , 134 Wn.2d 558, 951 P.2d 1124 (1998).....	8, 9, 13
<i>Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.</i> , 150 Wn. App. 1, 206 P.3d 1255 (2009).....	9
<i>Mutual of Enumclaw v. Cox</i> , 110 Wn.2d 643, 757 P.2d 499 (1988).....	13
<i>Northwest Independent Forest Manufacturers v. Department of Labor &amp; Industries</i> , 78 Wn. App. 707, 899 P.2d 6 (1995).....	1
<i>Polygon Northwest Company v. American National Fire Insurance Company</i> , 143 Wn. App. 753, 189 P.3d 777 (2008).....	8
<i>R.A. Hanson Co., Inc. v. Aetna Ins. Co.</i> , 26 Wn. App. 290, 612 P.2d 456 (1980).....	9
<i>Scottish &amp; York International Insurance Group v. Ensign Insurance Company</i> , 42 Wn. App. 158, 709 P.2d 397 (1985).....	8
<i>Travelers Insurance Companies v. North Seattle Christian and Missionary Alliance</i> , 32 Wn. App. 836, 650 P.2d 250 (1982).....	13
<i>Truck Insurance Exchange v. Vanport Homes, Inc.</i> , 147 Wn.2d 751, 58 P.3d 276 (2002).....	8
<i>Wickswat v. Safeco Ins. Co.</i> , 78 Wn. App. 958, 904 P.2d 767 (1996).....	13

### Statutes

RCW 48.01.030 .....	16, 17
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Hartford cross-appeals the trial court's September 12, 2008 order based solely on a reading of the complaint that Hartford breached its contractual duty to defend Wellman in the underlying Buchholz matter. Hartford acknowledges that subsequent to that September 12, 2008 order, the trial court dismissed the same contractual duty to defend claim for failure of OMI to prove proximate causation or damages. (CP 68-70.) Hartford's cross-appeal of the trial court's September 12, 2008 order is moot should the order on proximate causation and absence of damages and all other summary judgment dismissal orders secured by Hartford be affirmed on appeal.

**A. The Trial Court Erred in Finding a Contractual Duty to Defend Wellman Given the Absence of Any Elevator-Related Allegations in the *Buchholz* Complaint<sup>1</sup>**

Hartford insured Wellman and Zuck, Inc. ("Wellman") under a narrow Owners and Contractors Protective ("OCP") liability policy which

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<sup>1</sup> On September 12, 2008, before the tender misrepresentations were uncovered, the trial court entered an order that Hartford had a contractual duty to defend Wellman in the *Buchholz* matter. (CP 953-955). OMI's claim that Hartford breached its duty to defend Wellman in the *Buchholz* matter was subsequently dismissed on the absence of causation or damages. (CP 68-70). OMI presented no evidence in the trial court of damages caused by Hartford's alleged breach of its contractual duty to defend, an essential element of any breach of contract claim. *Northwest Independent Forest Manufacturers v. Department of Labor & Industries*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

OMI does not address or offer any argument in its opening appellate briefing addressing the trial court's dismissal of OMI's breach of the contractual duty to defend claim against Hartford based upon the absence any damages, i.e., defense fees and costs related to Otis or the elevator. OMI never presented any evidence substantiating breach of contract damages.

unambiguously limited coverage and defense for Wellman (as the Named Insured) for “property damage” liability arising out of Otis’ product and work at the Project or Wellman’s supervision thereof. (CP 1491-1513.) The Hartford policy was not a broad Commercial General Liability policy. It did not cover Wellman’s general contractor scope of work and certainly not its liability for the defective work of other subcontractors expressly identified in the *Buchholz* complaint.

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 ... **“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 ... “property damage” **only if:**
  - (1) The ... “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).

Wellman does not contest that the policy unambiguously limits coverage for Wellman to “property damage” arising solely out of Otis’ scope of work in selling and installing an elevator or Wellman’s supervision of Otis’ operations at the Project. Wellman does not dispute the limited coverage provided by Hartford. Hartford’s OCP 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.” (CP 1512.) Wellman’s president, Brian Wellman, agreed during his deposition that coverage for Wellman under Hartford’s OCP policy was limited to property damage from Otis’ elevator and that there were never any allegations of physical defects or damages arising out of Otis’ product or work. (CP 1276, 1280, 1281, 1286.)

The *Buchholz* complaint alleges in pertinent part:

- 1.12 That Defendant Wellman & Zuck breached the construction contract and its warranty by (1) failing to provide work that was free from defect; (2) failing to provide work in conformity with the construction documents; (3) failure to comply with applicable building codes; and (4) failure to perform the work in a proper and workmanlike manner; and (5) by failing to complete construction in the time required by the construction contract. (CP 1515-1524.)
- 1.13 That as a direct and proximate cause of the breach of contract as aforesated, the building located at

1301 West Holly Street and the condominiums and common spaces therein have suffered severe and significant water damage which requires repair. (CP 1515-1524.) (Emphasis added).

- 1.14 That Defendant Wellman & Zuck was made aware of the defects and attempted to make repair but have failed to do so. That further demands and requests have been made upon Wellman & Zuck to repair said defects, but Defendant has wholly failed, refused and neglected to do so.<sup>2</sup> (CP 1515-1524.)
- 1.15 That as a direct and proximate result of the breach of the construction contract by Defendant Wellman & Zuck as aforestated, the Plaintiffs have herein suffered the following damages:

\* \* \* \* \*

- (c) For damages incurred for the installation of *siding*, ...
- (d) For damages incurred in *installing vinyl covering applied to decks*, ...
- (e) For damages for Defendant's failure to install *window coverings*, ...
- (f) For damages for Defendant's failure to install *landscaping* in the amount allowed in the contract, ...

\* \* \* \* \*

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<sup>2</sup> Mr. Wellman confirmed during deposition 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 recall any allegations of defects or damages regarding Otis' work or water damage caused by Otis' work. (CP 1275, 1286.) Nonetheless, Wellman proceeded to tender and ultimately sue Hartford, contending there was coverage.

- (h) For damages incurred in repairing defective *roofing and flashing* ...
- (i) For damages incurred by plaintiffs yet to be discovered, in a sum which shall be determined at the time of trial.

*Id.* (emphasis added).

The same specific defect allegations are reiterated in Paragraphs 2.6 (a)–(i) of the *Buchholz* complaint and in the Prayer for Judgment. (*Id.*) The *Buchholz* complaint alleges very detailed and specific construction defects and damages related to the installation of siding, vinyl deck covering, window coverings, landscaping, and roofing and flashing. There is no implied, let alone direct, reference to the Otis elevator (or any other unnamed subcontractor’s product) installed at the Project. 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.”<sup>3</sup> (CP 1283.) The *Buchholz* complaint does not remotely reference or allege any defects or

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<sup>3</sup> As stated in Hartford’s Response Brief, Wellman did not tender the *Buchholz* matter to Hartford until 12 months after the filing of the *Buchholz* complaint and 60 days after the publication of ERD’s extensive forensic report confirming the complete absence of any elevator-related defect or damages. The ERD report confirms there were never any claims by the building owners for elevator-related damages. The timeline and Wellman’s express understanding of the scope of damages claim underscore its tender and suit misrepresentations of covered damage associated with the elevator.

damages caused by or associated with Otis' scope of work or its supervision. (CP 1515-1524.)

OMI, ignoring the actual language of the complaint, further argues in its Reply Brief that there mere reference to "severe and significant water damage" and damages "yet to be discovered"<sup>4</sup> indicated that "plaintiffs' claims included damages caused by other unidentified contractors on the project—including Otis."<sup>5</sup> OMI's argument is not grounded in complaint language and is simply unreasonable. If credited, every potential insurer of a subcontractor on the Project whose work is not expressly referenced in the complaint would be liable to accept a defense tender from Wellman.

The complaint identifies express product and subcontractor trade work that was defective. There is no ground to imply that unnamed products or other subcontractor work like Otis Elevator caused damages. Silence does not create an implication of other defective subcontractor work like Otis. Under OMI's theory, any unnamed manufacturer who provided a product to Wellman's project would have to defend if it

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<sup>4</sup> OMI asserts the "damages 'yet to be discovered'" language in the *Buchholz* complaint for the first time in its Reply Brief before this court. OMI made no such argument before the trial court in support of its motion regarding Hartford's alleged contractual duty to defend (*see* CP 1032–1042) or its Appellate Brief. Nonetheless, it does not help Wellman because it also lacks specificity.

<sup>5</sup>*See* OMI's Reply Brief, p. 5.

provided an OCP policy. Even a presumably broad reading of a complaint cannot require unnamed product suppliers or subcontractors working on a Project to defend where there is no reference to their work or damages causation. Some specificity is required. Here, there is no mention of Otis or the elevator whatsoever. In fact, no words in the complaint even imply damage by or to an elevator.

Hartford denied Wellman's *Buchholz* tender of defense based upon a reading of the complaint which does not mention Otis or an elevator and thus does not implicate 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 exclusion, no coverage was provided under the Insuring Agreement. (*Id.*) 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 in the Insuring Agreement is also not satisfied because there are absolutely no allegations of an elevator accident or progressive loss causing damage.

The duty to defend arises at the time a complaint is first brought and where it conceivably implicates 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 consideration in determining whether a duty to defend exists is whether the allegations in the complaint, if proven true, would require the insurer to pay out within the four corners of 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). Where there are no complaint claims covered by the insuring agreement, an insurer is relieved of a duty to defend. *Kirk* at 561. The trial court erred by reading too much into the complaint particularly where specific subcontractor work, but not the work of Otis, was expressly named as causal agents of property damage. 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 complaint property damage allegations. *Id.*

The OCP policy coverage at issue is very much like additional insured coverage in that it restricts coverage for property damages to the work or product of a subcontractor, here Otis. This court has held that an

insurer of an additional insured involved in a construction defect matter need not pay for damages and/or defense fees and costs unrelated to the named insured 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 general contractor Wellman and Hartford (Otis' insurer) was not liable for a defense or damages unrelated to the elevator. Because Wellman was not potentially liable for elevator damages and because there were no elevator-related damages, there was no duty to defend. The complaint reflects the absence of allegations of Otis-related damage.

In comparing the express language of Hartford's OCP policy to the allegations in the *Buchholz* 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). Hartford's OCP policy is not a broad Commercial General Liability policy and does not respond without some concrete nexus to the elevator. The general mention of damages and damages "yet to be discovered" is insufficient to trigger a contractual defense obligation under Hartford's narrow OCP policy. The complaint simply does not allege or infer any "property damage" arising out of Otis' product or work or Wellman's supervision thereof. This is underscored by

the highly specific complaint identification of other subcontractors' allegedly defective work and products. If this had been a tender by Wellman as an additional insured under a policy issued to Otis, there would be no defense obligation.

A bare allegation of general water intrusion damage against a general contractor, 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 OCP policy. Necessarily, there had to be a complaint reference to the elevator to implicate the OCP policy which is responsive only for property damage caused by the elevator. The trial court erred in ruling that the *Buchholz* complaint allegations triggered a contractual duty to defend under Hartford's OCP policy and should be reversed.

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

An alternative ground exists to reverse the September 12, 2008 order. After subsequent discovery, and further briefing and argument, the trial court, on October 8, 2008, denied OMI the potential remedy of estoppel into coverage because of plaintiff's "unclean hands" and bad faith (CP 1123-1142, CP 956-958) and, on October 1, 2010, dismissed OMI's bad faith and CPA claims based upon plaintiff's misrepresentations in

tendering coverage under Hartford's limited OCP policy. (CP 617-789 and CP 373-375.) Despite its rulings, the trial court denied Hartford's motion for reversal of the trial court's September 12, 2008 Order that Hartford had a contractual duty to defend Wellman in *Buchholz*. (CP 71-72.) The trial court may have thought its dismissal of OMI's claim for breach of the contractual duty to defend based upon the absence of any actual damages mooted its original decision. Nonetheless, there is an inconsistency in rulings, perhaps explained by the chronology of decisions, but still an inconsistency. If the misrepresentations were severe enough to dismiss the bad faith and CPA claims, the duty to defend contract claim also should have been denied on the same analysis.

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 expert 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.) Wellman tendered to Hartford, knowing that the predicate of facts of elevator-related defects and damages was entirely absent. The *Buchholz* tender was thus a misrepresentation by both Wellman and OMI and their attorneys. They made claims knowing they were groundless and false. Whether done intentionally or negligently, they were

misrepresentations. Wellman does not argue that the orders finding the misrepresentations and dismissing the bad faith and CPA claims was in error.

Wellman's representatives and OMI confirmed that they knew, prior to tendering to Hartford, that there were no elevator-related claims. Mr. Brian Wellman testified that Wellman itself investigated defect claims at the project prior to the filing of the complaint against it; 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. (CP 1283-1285, 1276, 1280, 1281, 1286). Wellman's corporate counsel, Mr. Frank Chmelik, incredibly did 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. (CP CP 1312, 1313, 1315 and 1304.) OMI's senior claims adjuster, Mr. James Rumpee, admitted that he conducted no investigation prior to directing Mr. Chmelik to "aggressively pursue" Hartford and file a bad faith suit. (1243-1244.) All of these parties tendered to Hartford asserting covered claims when there were none. This was also the basis of the trial court's "unclean hands" order finding Wellman/OMI to have acted in bad faith and with "unclean hands," defeating all equitable remedies.

The Court of Appeals has held that an insured is precluded from maintaining bad faith and CPA claims as a matter of law 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); *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).<sup>6</sup> The purpose is to prevent awarding a windfall to an insured who misrepresents claims. *Kim* at 356, citing *Mutual of Enumclaw v. Cox*, 110 Wn.2d 643, 652, 757 P.2d 499 (1988). 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,

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<sup>6</sup> At page 8 of its Reply Brief, OMI argues that *Travelers Insurance Companies v. North Seattle Christian and Missionary Alliance*, 32 Wn. App. 836, 650 P.2d 250 (1982) and *Kirk v. Mt. Airy Insurance Company*, 134 Wn.2d 558, 951 P.2d 1124 (1998) "belies Hartford's claim that the tenders were 'frivolous' or 'misrepresentations' because Wellman allegedly 'knew' Otis' work was not implicated." First, the established and unchallenged record conclusively establishes that Wellman knew there were no elevator related claims prior to tendering to Hartford. Second, *Travelers Insurance Companies v. North Seattle Christian and Missionary Alliance* and *Kirk v. Mt. Airy Insurance Company* do not address the question of whether an insured has a duty to defend claims based upon known misrepresentations and are thus inapposite.

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 demanded monetary benefits under Hartford's policy. The tenders with knowledge that there were never any elevator-related damage prove that Wellman's tenders were material misrepresentations to Hartford. OMI did not, and cannot, present any evidence to the contrary. OMI does not appeal the trial court's ruling establishing material misrepresentation as a matter of law or assert that the trial court improperly applied *Kim v. Allstate*.<sup>7</sup>

In addition to addressing and dismissing the insured's CPA and bad faith claims, the Court of Appeals in *Kim* also considered whether material misrepresentations precluded coverage benefits to the insured. *Kim* at 344-345. The Court of Appeals ruled that there were issues of disputed fact regarding the materiality of the insured's misrepresentations, and remanded for trial. *Id.* at 345, 366. The only reason the coverage claim was not denied was a question of whether the misrepresentations were material. *Id.* Had the Court found the misrepresentations to be

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<sup>7</sup> An insured's misrepresentations preclude a finding that an insurer acted in bad faith or violated the CPA as a matter of law. *Kim* at 345.

material, it clearly would have also denied the coverage claims as well as the bad faith and CPA claims.

Hartford requests that this Court apply *Kim* and hold that the result of Otis' undisputed material misrepresentations, bad faith and "unclean hands" in claiming insurance coverage also results in loss of its claim for breach of the contractual duty to defend.<sup>8</sup> It is a natural extension of *Kim* and its policy concern to deny benefits to an insured where the insured violates its good faith duties regarding tender of claims. The trial court should have relied on *Kim* and reversed its decision finding a contractual duty to defend.

The materiality of Wellman's misrepresentations is not an issue on appeal. The issue was not preserved, let alone supported by argument. Nowhere in its briefing does OMI challenge the trial court's finding and order that Wellman's and OMI's tenders to Hartford were material misrepresentations. OMI does not even address or mention *Kim v. Allstate Insurance Company, Inc.* anywhere in its appellate briefing. The trial court

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<sup>8</sup> In both its Opening Appellate Brief and Reply Brief, OMI attempts to distract this court by reciting Washington law on the duty to defend and bad faith and refusing to recognize or address that the trial court's dismissal of OMI's claims against Hartford were based on Wellman's and OMI's conduct in pursuing coverage from Hartford for non-existent elevator-related claims. The trial court dismissed OMI's claims based upon OMI's and Wellman's misrepresentations, bad faith, and unclean hands. Hartford's alleged conduct was not at issue before the Court in Hartford's series of motions for summary judgment dismissal of OMI's claim granted by the trial court. OMI essentially offers no argument and does not specifically appeal the basis of trial court's misrepresentation and "unclean hands" dismissal orders based upon its conduct.

orders denying bad faith and CPA claims are not challenged substantively on appeal. OMI has thus conceded the facts of misrepresentation.

The analysis in *Kim* is consistent with RCW 48.01.030 which provides:

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.)

The trial court erred 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 all of its claims under Hartford's limited OCP policy, acted with unclean hands and in bad faith, 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, in bad faith and based upon misrepresentations. Such a result would disregard policies underscoring the good faith required by all parties to the insurance contract consistent with RCW 48.01.030 and *Kim*.

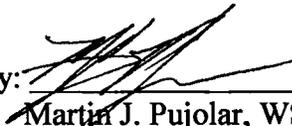
OMI does argue that extending the rulings of *Kim v. Allstate* to the tender of the contractual duty to defend would "have a chilling effect on an insured's decision to tender a suit to its liability insurer." (See OMI's Reply Brief, p. 21.) Hartford submits that there should be a "chilling

effect” on insureds tendering known unfounded claims to insurers. Such a result is in accordance with RCW 48.01.030 which requires both the insurer *and* insured to act in good faith, abstain from deception, and practice honesty and equity in all insurance matters.

In summary, this is not a case of potentially covered claims giving rise to any Hartford obligation. Wellman/OMI knew before tender to Hartford that there were no elevator-related claims. They nonetheless tried to manufacture a claim for coverage and have abused the litigation process, causing unnecessary cost and expense to Hartford. The Court is requested to reverse the September 12, 2008 Order and to apply *Kim v. Allstate* to deny Wellman/Otis a breach of contractual duty to defend claim, given its undisputed misrepresentations of tender of coverage. It would violate the letter and spirit of RCW 48.01.030 and the policy considerations underlying *Kim* to allow an insured to receive a policy benefit based upon deceptive conduct.

Respectfully submitted this 02 day of November, 2011.

FORSBERG & UMLAUF, P.S.

By: 

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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 HARTFORD FIRE  
INSURANCE COMPANY'S REPLY BRIEF RE: CROSS-APPEAL on  
the following individuals in the manner indicated:

Mr. Gary Sparling  
Soha & Lang, P.S.  
1325 Fourth Ave., Suite 2000  
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 Via Hand Delivery

SIGNED this 3rd day of November, 2011, at Seattle,  
Washington.

V.M. Waters  
Veronica M. Waters

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STATE OF WASHINGTON  
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