

70201-7

70201-7

No.: 70201-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ON APPEAL FROM
KING COUNTY SUPERIOR COURT NO. 11-2-31670-0

ALLSTATE INDEMNITY COMPANY,

Appellant,

v.

MIRTHA ANGARITA,

Respondent.

BRIEF OF RESPONDENT

Angela Wong, WSBA #28111
WONG BAUMAN LAW FIRM, PLLC
1100 Dexter Avenue North, Suite 100
Seattle, WA 98109
Telephone: 206-788-3000
Facsimile: 877-310-3020
Attorney for Respondent

RECEIVED
STATE OF WASHINGTON
OCT -4 PM 3:29

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESPONSE TO ASSIGNMENTS OF ERROR.....	1
III.	STATEMENT OF THE CASE.....	3
	A. Facts of the Accident.....	3
	B. Examination Under Oath.....	5
	C. Allstate’s Denial of Coverage.....	9
	D. Villanueva Deposition.....	10
	E. Motions for Summary Judgment.....	10
	F. Motion for Reconsideration.....	11
	G. Motion for Attorney Fees.....	12
	H. Allstate’s Notice Of Appeal.....	12
IV.	LEGAL ARGUMENT.....	13
	A. Standard of Review.....	13
	B. Angarita Did Not Conceal Material Facts Because Allstate Purposely Kept Itself Ignorant of Those Facts.....	15
	C. Allstate May Not Deny PIP Coverage Because It Purposely Kept Itself Ignorant of Material Facts.....	17
	D. Even If Angarita Concealed Material Facts, The Terms Of Allstate’s Policy Still Provides For Coverage.....	20
	1. Interpretation of Insurance Contracts.....	21

2. Allstate’s Policy Is Severable Under Its “Fraud or Misrepresentation” Provision.....	25
3. Villanueva’s Misrepresentations Do Not Void Angarita’s Coverage Because Angarita’s Policy with Allstate Is Separate And Distinct From Villanueva’s Policy.....	31
4. Allstate’s “Fraud or Misrepresentation” Provision Does Not Apply To <i>Concealment</i> Of Material Facts After A Loss.....	36
E. The Trial Court Correctly Precluded Allstate From Voiding Coverage For Villanueva’s <i>Liability</i> To Angarita And Third Parties.....	41
F. Even If Villanueva’s Liability Coverage Is Void, The Court’s Order Voiding Coverage As to Villanueva Only, Entitles Angarita To UIM Coverage For Villanueva’s Liability.....	47
G. Allstate Failed To Raise The Issue That Angarita Is Not Entitled To <i>Olympic S.S.</i> Fees Due To “Unclean Hands” Before The Trial Court.....	47
H. Angarita is Entitled to Attorneys Fees And Costs on Appeal.....	49
V. CONCLUSION.....	50

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>PAGE</u>
<i>Aetna v. M&S Industries</i> , 64 Wn.App. 916 (1992).....	23
<i>Allstate Ins. Co. v. Huston</i> , 123 Wash. App. 530, 94 P.3d 358 (2004).....	26, 37
<i>Allstate Ins. Co. v. Peasley</i> , 131 Wn.2d 420, 932 P.2d 1244 (1997).....	13, 21-22
<i>Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.</i> , 134 Wn.2d 413 (1998).....	24
<i>Blackburn v. Safeco Ins. Co.</i> , 115 Wn.2d 82, 794 P.2d 1259 (1990).....	32
<i>Blair v. WSU</i> , 108 Wn.2d 558, 740 P.2d 1379 (1987).....	48
<i>Boeing v. Aetna</i> , 113 Wn.2d 869, 887, 784 P.2d 507 (1990).....	25
<i>Bosko v. Pitts & Still, Inc.</i> , 75 Wn.2d 856, 454 P.2d 229 (1969).....	17
<i>Daley v. Allstate</i> , 135 Wn.2d 777 (1998).....	22
<i>Ellis Court Apartments Ltd. v. State Farm</i> , 117 Wn.App. 807 (2003).....	22
<i>Emter v. Columbia Health</i> , 63 Wn.App. 378, 384 (1991), <i>rev. denied</i> , 119 Wn.2d 1005 (1992).....	25
<i>Estate of Jordan v. Hartford Co.</i> , 120 Wn.2d 490, 844 P.2d 403 (1993).....	49
<i>Farmers Ins. Co. v. Edie</i> , 52 Wn.App. 411 (1988).....	34
<i>Farmers Ins. Co. of Washington v. Hembree</i> , 54 Wn.App. 195 (1989)....	34

<i>Greer v. Northwestern Nat'l Ins. Co.</i> , 109 Wn.2d 191 (1987).....	24
<i>Hamm v. State Farm Mut. Auto. Ins. Co.</i> , 151 Wn.2d 303, 88 P.3d 395 (2004).....	32
<i>JDFJ Corp. v. Int'l Raceway, Inc.</i> , 97 Wn.App. 1, 970 P.2d 343 (1999)..	14
<i>Keenan v. Indus. Indem.</i> , 108 Wn.2d 314, 738 P.2d 270 (1987).....	33
<i>Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.</i> , 124 Wn.2d 618, 627, 881 P.2d 201 (1994).....	22
<i>Lambert v. State Farm Mut. Auto. Ins. Co.</i> , 2 Wn.App. 136, 467 P.2d 214, rev. denied, 78 Wn.2d 993 (1970).....	37
<i>Matsyuk v. State Farm Fire & Cas. Co.</i> , 173 Wn.2d 643, 272 P.3d 802 (2012).....	32-34, 36
<i>McDonald Indus., Inc. v. Rollins Leasing Corp.</i> , 95 Wn.2d 909 (1981).....	21, 23
<i>McDonald v. State Farm</i> , 119 Wn.2d 724 (1992).....	24
<i>Mendoza v. Rivera-Chavez</i> , 140 Wn.2d 659, 999 P.2d 29 (2000).....	35, 43-45
<i>Mid-Century Ins. Co. v. Henault</i> , 128 Wn.2d 207 (1995).....	21, 23
<i>Morgan v. Prudential Ins. Co.</i> , 86 Wn.2d 432 (1976).....	24
<i>Mutual of Enumclaw v. Cox</i> , 110 Wn.2d 643, 757 P.2d 499 (1988).....	21, 27-28, 34, 39-41, 43
<i>N.H. Indem. Co. v. Budget Rent-A-Car</i> , 148 Wn.2d 929 (2003).....	22
<i>Newcomer v. Masini</i> , 45 Wn.App. 284, 724 P.2d 1122 (1986).....	14
<i>Olympic S.S. Co., Inc. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991).....	1-3, 12-13, 22, 47-50

<i>Phil Schroeder, Inc. v. Royal Globe Ins. Co.</i> , 99 Wn.2d 65, 68 (1983), <i>modified on reconsideration</i> , 101 Wn.2d 830 (1984).....	23
<i>Queen City Farms, Inc., v. Central Nat. Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 718 (1994).....	22, 24
<i>Reitz v. Knight</i> , 62 Wn.App. 575, 814 P.2d 1212 (1991).....	14
<i>Rones v. Safeco Ins. Co. of Am.</i> , 119 Wn.2d 650, 835 P.2d 1036 (1992).....	13, 22, 32
<i>Rupert v. Gunter</i> , 31 Wn.App. 27, 640 P.2d 36 (1982).....	48
<i>Sac Downtown Ltd. P'ship v. Kahn</i> , 123 Wn.2d 197, 867 P.2d 605 (1994).....	48
<i>Saletic v. Stammes</i> , 51 Wn.2d 696, 321 P.2d 547 (1958).....	27
<i>Sherry v. Fin. Indem. Co.</i> , 160 Wn.2d 611, 160 P.3d 31 (2007).....	34-35
<i>St. Paul Mercury Ins. Co. v. Salovich</i> , 41 Wn. App. 653, 705 P.2d 812, <i>rev. denied</i> , 104 Wn.2d 1029 (1985).....	38-39
<i>State Farm Fire & Cas. Co. v. Ham & Rye LLC</i> , 142 Wn.App. 6, 174 P.3d 1175 (2007).....	23, 29
<i>Swanson v. Solomon</i> , 50 Wn.2d 825, 314 P.2d 655 (1957).....	37
<i>Torgerson v. North Pacific Ins. Co.</i> , 109 Wn.App. 131 (2001).....	21, 24
<i>Vision One, LLC v. Philadelphia Indem. Ins. Co.</i> , 174 Wn.2d 501, 276 P.3d 300 (2012).....	13, 21, 23
<i>Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.</i> , 170 Wn.App. 666, 285 P.3d 892 (2012).....	48-49
<i>Wilcox v. Lexington Eye Institute</i> , 130 Wn.App. 234, 122 P.3d 729 (2005), <i>review denied</i> , 157 Wn.2d 1022, 142 P.3d 609.....	14

<i>Winters v. State Farm Mut. Auto. Ins. Co.</i> , 144 Wn.2d 869, 31 P.3d 1164 (2001).....	32
<i>Yadheim v. Continental Ins. Co.</i> , 107 Wn.2d 836 (1987).....	24
<i>Young v. Teti</i> , 104 Wn.App. 721, 16 P.3d 1275 (2001), <i>overruled by</i> <i>Matsyuk v. State Farm Fire & Cas. Co.</i> , 173 Wn.2d 643, 272 P.3d 802 (2012).....	33
<u>OTHER CASES</u>	<u>PAGE</u>
<i>Amick v. State Farm Fire and Cas. Co.</i> , 862 F.2d 704 (8 th Cir. 1988).....	29
<i>Bryant v. Allstate Ins. Co.</i> , 592 F.Supp. 39 (E.D. Ky., 1984).....	30
<i>Fernandez v. Cigna Property and Cas. Ins. Co.</i> , 188 A.D.2d 700, 590 N.Y.S.2d 925 (N.Y.A.D. 3 Dept., 1992).....	30
<i>K & W Builders, Inc. v. Merchants and Business Men's Mut. Ins. Co.</i> , 495 S.E.2d 473, 255 Va. 5 (1998).....	30
<i>Ki Sin Kim v. Allstate Ins. Co., Inc.</i> , 153 Wn. App. 339, 223 P.3d 1180 (2009).....	40-41
<i>Kunin v. Benefit Trust Life Ins. Co.</i> , 910 F.2d 534 (9 th Cir.), <i>cert. denied</i> , 111 S. Ct. 581 (1990), <i>reh'g denied</i> , 111 S. Ct. 803 (1991).....	25
<i>McCauley Enterprises v. New Hampshire Ins. Co.</i> , 716 F.Supp. 718 (D. Conn., 1989).....	30
<i>Onyon v. Truck Ins. Exch.</i> , 859 F.Supp. 1338 (W.D. Wash. 1994).....	21, 40, 43
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	47-48
<i>Rosenfeld v. U.S. Dep't of Justice</i> , 57 F.3d 803 (9th Cir.1995), <i>cert.</i> <i>dismissed</i> , 516 U.S. 1103, 116 S.Ct. 833, 133 L.Ed.2d 832 (1996).....	14
<i>Sales v. State Farm Fire & Cas. Co.</i> , 849 F.2d 1383 (11th Cir.1988), <i>rev'd on other grounds</i> , 902 F.2d 933 (11th Cir.1990).....	29

<i>Spezialetti v. Pacific Employers Ins. Co.</i> , 759 F.2d 1139 (3 rd Cir. 1985).....	29
<i>State Farm Fire and Cas. Ins. Co. v. Kane</i> , 715 F.Supp. 1558 (S.D. Fla., 1989).....	30
<i>Touchette v. Northwestern Mut. Ins. Co.</i> , 80 Wn.2d 327, 494 P.2d 479 (1972).....	44
<i>Union Ins. Exch., Inc. v. Gaul</i> , 393 F.2d 151 (7th Cir. 1968).....	17-19

<u>STATUTES</u>	<u>PAGE</u>
RCW 4.22.005 – 4.22.100.....	35
RCW 48.22.005(5)(b).....	33
RCW 48.22.030.....	35, 47
RCW 46.29.....	35, 42
RCW 46.29.490.....	43
RCW 46.29.490(1).....	43
RCW 46.29.490(6)(a).....	42-43, 46
RCW 46.30.....	35, 42
<u>RULES</u>	<u>PAGE</u>
CR 59.....	15
RAP 2.5(a).....	47
RAP 18.1.....	50
<u>REGULATIONS</u>	
WAC Chapt. 284-30.....	35

TREATISE

14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 34:3, at 434 (2d ed. 2009)..... 14

I. INTRODUCTION

Respondent Mirtha Angarita (“Angarita”) respectfully requests that the Court of Appeals affirm the Superior Court’s orders granting insurance coverage to Angarita from Appellant Allstate Indemnity Company (“Allstate”) and awarding attorney fees and costs to Angarita under *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

Allstate does not assert that Angarita made any false statements or misrepresentations. In fact, it is undisputed that Angarita’s statements have always been truthful. Instead, Allstate asserts that Angarita *concealed* material facts during an examination under oath (“EUO”). However, Allstate may not claim that Angarita concealed material facts during the EUO, when Allstate purposely did not ask Angarita any questions about them. Furthermore, even if Angarita did conceal material facts, Allstate may not deny Angarita coverage for “concealment” after an accident under the terms of its own policy. Finally, misrepresentations by the co-insured, Defendant Perla Villanueva (“Villanueva”), only voided insurance coverage as to Villanueva only, not to Angarita or third parties.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Allstate has not identified errors that would justify reversing the trial court:

1. The Superior Court correctly construed Allstate's insurance policy and held that Angarita was entitled to coverage under the plain language of Allstate's policy, even if she concealed material facts after the accident. CP 352-353.

2. The Superior Court correctly held that misrepresentations by a co-insured, Villanueva, only voided insurance coverage as to Villanueva only, not to Angarita and third parties. CP 495-497.

3. The Superior Court acted within its discretion in denying Allstate's motion for reconsideration of its order granting insurance coverage to Angarita, even though it subsequently held that the policy was void as to Villanueva, because Allstate's policy is severable. CP 527-529.

4. The Superior Court correctly awarded attorney fees and costs to Angarita against Allstate under *Olympic S.S. Co., Inc. v. Centennial Ins. Co., supra*, for prevailing on the insurance coverage issue. Furthermore, Allstate failed to raise the argument

that Angarita is not entitled to *Olympic S.S.* fees for having “unclean hands” before the trial court. CP 531-533.

III. STATEMENT OF THE CASE

A. Facts of the Accident

This lawsuit arises out of a motor vehicle accident on February 19, 2010 wherein Angarita suffered injuries. Angarita was a passenger in a vehicle driven by Defendant Perla Villanueva (“Villanueva”) and rear-ended by Defendant Jeffrey Butler (“Butler”). CP 1-5. Both Villanueva and Butler deny liability for the accident. CP 141, 201. At the time of the accident, Villanueva was insured by Allstate and Allstate’s policy provided for “no-fault” Personal Injury Protection (“PIP”) coverage to passengers in Villanueva’s vehicle. CP 8.

Angarita moved to the United States less than a year before the accident happened on February 19, 2010. CP 89. At that time, she did not drive and was unfamiliar with the roadways and streets in and around Seattle. CP 90. Villanueva and Angarita cleaned houses together, and they were on their way to a cleaning job when the accident happened. CP 92. Butler struck the rear of Villanueva’s vehicle while traveling south on Interstate 5. CP 192. Butler claims that Villanueva was attempting to merge into his lane when he struck Villanueva’s vehicle from behind. *Id.*

After the accident, Butler pulled over and provided Villanueva with his name and telephone number. CP 195. Butler did not provide any insurance information to Villanueva. CP 200. Angarita did not understand what was being said between Villanueva and Butler at the scene of the accident, because she understood very little English. CP 94. Butler never spoke with Angarita or provide her with his contact information, and Villanueva never gave Butler's contact information to Angarita. CP 196; 208-209. According to Butler, Villanueva advised him that she would get a bid for the damage to her car, and Butler offered to split the cost with her. CP 196. Since Angarita's husband worked at a body shop, Villanueva drove there with Angarita to obtain a damage estimate immediately after the accident. CP 94.

After some negotiations with Villanueva by telephone, Butler met with Villanueva 4 days after the accident and paid her \$1300 in exchange for a full release. CP 207. Butler had expected Angarita to be there and to also sign the release in exchange for the \$1300, but Villanueva told Butler not to worry about Angarita, because she was leaving the country:

A. And [Villanueva] told me at the time that her friend was visiting here and was not going to be there that morning.

Q. Okay. So go ahead and tell me what happened next.

A. I said, "I'm really uncomfortable exchanging money without her releasing it as well." And she assured me everybody was fine, nobody was hurt, and that her friend was gone -- was leaving, excuse me. She was not from here and she was going back somewhere. She didn't indicate where she was going back to.

Obviously now that was a big mistake, but I went ahead and had her sign it, I signed it, I crossed out the area that her friend/passenger would have signed, and I gave her \$1300, I took the original, and we were on our way.

CP 199; See also CP 207 – Release Agreement.

B. Examination Under Oath

On January 14, 2011, Villanueva testified in an examination under oath (“EUO”) for Allstate. CP 73-86. She testified that Butler fled the scene of the accident without leaving his contact information. CP 81. Angarita was not present during Villanueva’s EUO. CP 120. On the same day shortly after Villanueva’s examination, Angarita also testified in an EUO for Allstate through an interpreter. CP 88.

Angarita and Villanueva had talked very little after Angarita stopped cleaning houses with Villanueva and began working as a caregiver for the Sea Mar Clinic in June 2010. CP 110, 119-120. However, just before Angarita’s EUO, Angarita received a text from Villanueva, telling her to testify that Butler fled the scene. CP 120. At that time, Angarita did not know what Villanueva had testified to during her examination. CP 120. Not wanting anything to do with Villanueva,

Angarita ignored the text, and testified truthfully during her EUO. CP 208-209. Angarita testified Butler did not flee the scene and that he provided Villanueva with his contact information. Angarita further testified that she and Perla went to her husband's work to obtain an estimate for the car damage right after the accident:

Q. So once both cars stopped and everybody got out of their cars, what happened next?

A. Well, they looked at the car, at the damages on the car, and they talked, and they exchanged information and telephones, and Perla took the license plate and the phone number, and Perla kept that information.

Q. How were Perla and this man communicating? In English? In Spanish?

A. In English.

Q. Is your English fluent enough that you understood what was being said?

A. No. I speak very little English. Well. I could understand that the man -- that they were looking at the cars, where the car had been hit, and he gave her -- they exchanged telephone numbers, and that's it.

Q. The man that hit Perla, did he give her any driver's license or insurance information?

A. The man? No. No. He just gave her his phone number.

Q. Then after information was exchanged, what happened next?

A. Well, we said good-bye, the man said good-bye, and I called my husband at work. He fixes cars, and I told him about the accident, and Perla wanted him to give us a quote for her fixing the car.

* * * *

Q. So after you exchanged information and you called your husband, what happened next?

A. We went with Perla, because she wanted that – she wanted my husband to give her a quote for fixing the car.

Q. So where did you go?

A. To where he was working at that time.

CP 94-95. The parties do not dispute that this is exactly what happened.

After Angarita advised Allstate that Villanueva and Butler looked at their car damage at the scene, exchanged information, and that she and Villanueva went to her husband's work to obtain an estimate for Villanueva's car damage, Allstate did not ask Angarita any more questions about Villanueva, Butler, or the damage estimate. CP 95-98. Allstate did not inquire about what Villanueva did with the estimate, who it was for, how much was it for, etc. CP 87-98. Instead, Allstate pursued a new line of questioning about Angarita's husband and Angarita's injuries from the accident. *Id.* Allstate never broached the subject of the damage estimate (or what Villanueva did with it) again for the remainder of Angarita's EUO. *Id.*

Angarita did not testify that Villanueva contacted Butler after the accident, because Allstate chose not to ask her any more questions about the two of them, even though it was the logical extension of Angarita's testimony that Butler and Villanueva exchanged contact information and that Villanueva went to get a damage estimate for Butler to pay. *Id.*; CP 124. Furthermore, Allstate intentionally did not ask Angarita any questions regarding Villanueva's account of the accident or about the glaring inconsistencies between Angarita's testimony and Villanueva's testimony. CP 87-98. Had Allstate asked Angarita about the inconsistencies, Angarita would have disagreed with Villanueva's account of the accident. CP 208-209.

At the time of the EUOs in January 2011, Villanueva and Angarita were both represented by the same attorney, Mark Hammer & Associates. CP 74, 88. Mark Hammer & Associates subsequently withdrew from both cases after the EUOs, no doubt because of the glaring conflict of interest. About a year later, Angarita retained the undersigned's law firm. CP 208-209. Butler was identified by the undersigned as the other driver involved in the accident through some cell phone records that Allstate had obtained from Villanueva before Villanueva's EUO. CP 183-184. Mr. Butler's phone number was easy to

discern from the records that Allstate obtained from Villanueva, since it was the only number that appeared numerous times, and only during the time period from the date of the accident until about 3-4 days after the accident. *Id.* Despite having Villanueva's cell phone records even before the EUOs and having been advised by Angarita that Butler provided Villanueva with his phone number, Allstate made no attempt to identify Butler's phone number or his identity from the cell phone records.

C. Allstate's Denial of Coverage

Shortly after the EUOs, Allstate denied coverage to Angarita pursuant to the following provision in its policy:

Fraud or Misrepresentation

This entire policy is void from its inception if it was obtained or renewed through material misrepresentation, fraud or concealment of material fact made with the intent to deceive. This means that Allstate may not be liable for any claims or damages that would otherwise be covered.

We may not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy.

CP 155. As a result, this lawsuit ensued. After identifying Butler as the other driver from Villanueva's cell phone records, Angarita asserted

causes of action for negligence against Butler and Villanueva and a declaratory action for insurance coverage against Allstate. CP 1-5.

D. Villanueva Deposition

On Sept. 27, 2012, Villanueva's deposition was taken. Villanueva testified that she had lied about Butler leaving the scene during her EUO. CP 139. Villanueva further confirmed Angarita's and Butler's accounts of what happened immediately after the accident. Id.

E. Motions for Summary Judgment

On January 4, 2013, Allstate filed a motion for partial summary judgment, seeking a determination from the trial court that Angarita and Villanueva misrepresented and concealed material facts from Allstate as a matter of law. CP 29-45.

On January 22, 2013, Angarita opposed Allstate's motion and filed a cross motion for partial summary judgment against Allstate seeking a determination from the trial court that Angarita was entitled to insurance coverage, specifically PIP benefits, under the terms of Allstate's policy. CP 162-181. Angarita argued that she did not conceal any material facts from Allstate during her EUO when she testified truthfully and when Allstate purposely did not elicit testimony regarding those material facts from Angarita. Angarita further argued that even if

she concealed material facts, she was still entitled to coverage under the plain language of Allstate's "void for fraud" provision. *Id.*

On March 1, 2013, the trial court granted Angarita's cross motion for insurance coverage. The court entered a declaratory judgment against Allstate and found that Angarita was entitled to Personal Injury Protection ("PIP") coverage under Allstate's policy. CP 352-353.

On March 8, 2013, Allstate filed a supplemental brief seeking a determination by the trial court that *Villanueva* was precluded from any insurance coverage due to Villanueva's material misrepresentations to Allstate. CP 355-360.

On March 11, 2013, the trial court granted Allstate's motion and held that Villanueva's material misrepresentations voided any coverage "as to Villanueva only, not as to Plaintiff [Angarita] or third parties." CP 496-497.

F. Motion for Reconsideration

On March 11, 2013, Allstate filed a motion for reconsideration seeking reconsideration of the trial court's determination that Angarita was entitled to PIP coverage. CP 430-439. Allstate argued for the first time that since the trial court subsequently held that the policy was void as to Villanueva, the policy was also void as to Angarita, because its

policy was not severable. Allstate also introduced some new evidence and argued that Angarita not only concealed material facts, she also asserted “a false UIM claim.” Id. Allstate’s new “evidence” of Angarita’s assertion of a false UIM claim consisted only of letters written by Allstate. CP 441-446. Angarita has NEVER asserted that this case involved a hit and run, and Allstate can point to nothing in the record showing that she did. The trial court did not request a response from Angarita on Allstate’s Motion for Reconsideration. On April 3, 2013, the trial court denied Allstate’s motion for reconsideration. CP 527-529.

G. Motion for Attorney Fees

On March 11, 2013, Angarita filed a motion for attorney fees against Allstate pursuant to *Olympic S.S. Co., Inc. v. Centennial Ins. Co., supra*, for prevailing on the insurance coverage issue. On April 5, 2013, the trial court granted Angarita’s motion and awarded attorney fees to Angarita under *Olympic S.S. Co., Inc., supra*.

H. Allstate’s Notice of Appeal

On April 25, 2013, Allstate filed a Notice of Appeal designating appeal of 1) the trial court’s March 1, 2013 order granting PIP coverage to Angarita; 2) the trial court’s subsequent March 8, 2013 order voiding

coverage as to Villanueva only; 3) and the trial court's April 5, 2013 order granting Angarita attorney fees under *Olympic S.S. Co., Inc, supra*.

Allstate did not specifically designate the trial court's April 3, 2013 order denying its motion for reconsideration in its notice of appeal. However, since the bulk of Allstate's arguments on appeal pertain to whether its policy is severable in light of the trial court's subsequent order voiding coverage for Villanueva, and since these arguments were raised for the first time in Allstate's motion for reconsideration, Angarita will assume that the Court of Appeals will review the trial court's April 3, 2013 order denying reconsideration. RAP 2.4(f).

IV. LEGAL ARGUMENT

A. Standard of Review

Interpretation of language in an insurance policy is a question of law and the standard of review is *de novo*. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300, 305 (2012); *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 423–24, 932 P.2d 1244 (1997) (citing *Rones v. Safeco Ins. Co. of Am.*, 119 Wn.2d 650, 654, 835 P.2d 1036 (1992)).

However, motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial

court's ruling absent a showing of manifest abuse of discretion, which occurs when its decision is based on untenable grounds or reasons. *Wilcox v. Lexington Eye Institute*, 130 Wn.App. 234, 241, 122 P.3d 729 (2005), *review denied*, 157 Wn.2d 1022, 142 P.3d 609. By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts. *Newcomer v. Masini*, 45 Wn.App. 284, 287, 724 P.2d 1122 (1986); *Reitz v. Knight*, 62 Wn.App. 575, 581 n. 4, 814 P.2d 1212 (1991). However, while the issue is preserved, the standard of review is less favorable. *Cf.* 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 34:3, at 434 (2d ed. 2009) (effect on standard of review where error is preserved by motion for new trial). CR 59 does not permit a party to propose new theories of the case that could have been raised before entry of an adverse decision. *Wilcox v. Lexington Eye Inst.*, 130 Wn.App. 234, 241-42, 122 P.3d 729, 732-33 (2005); *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn.App. 1, 7, 970 P.2d 343 (1999). The trial court's discretion extends to refusing to consider an argument raised for the first time on reconsideration absent a good excuse. *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 811 (9th Cir.1995) (applying parallel federal rule), *cert. dismissed*, 516 U.S. 1103, 116 S.Ct. 833, 133 L.Ed.2d 832 (1996).

Here, the trial court's March 1, 2013 order granting PIP coverage to Angarita and the trial court's subsequent March 8, 2013 order voiding coverage only as to Villanueva are subject to de novo review. However, the trial court's April 3, 2013 order denying reconsideration of the March 1, 2013 order granting PIP coverage is reviewed for abuse of discretion.

In its motion for reconsideration, Allstate introduced new evidence and argued for the first time that Angarita asserted a "false UIM claim," by attributing letters written by Allstate as being Angarita's assertions. Allstate also argued that the trial court's subsequent order finding that coverage was void as to Villanueva also voided coverage as to Angarita, because its policy was not severable. Angarita was not given the opportunity to respond to the motion for reconsideration. The trial court did not abuse its discretion by refusing to consider Allstate's new evidence and new arguments. CR 59.

B. Angarita Did Not Conceal Material Facts Because Allstate Purposely Kept Itself Ignorant of Those Facts.

Allstate does not assert that Angarita misrepresented any material facts. It can point to nothing in the record to show that Angarita made any false statements. Instead it asserts that Angarita "concealed" material facts during her EUO, because 1) Angarita did not tell Allstate that its

insured, Defendant Villanueva, sent her a text asking her to lie, which Angarita ignored; and 2) Angarita did not tell Allstate that Defendant Villanueva contacted Defendant Butler after the accident.

Angarita did not conceal any facts from Allstate during her EUO, because Allstate purposely avoided asking her any questions about the glaring inconsistencies between Angarita's testimony and Villanueva's testimony. While Angarita did not witness Villanueva's testimony and did not know what she had testified to in her EUO, Allstate was well aware of the inconsistencies, having just examined Villanueva right before Angarita. Villanueva testified that Butler fled the scene. Angarita testified that Butler and Villanueva got out of their cars, looked at their car damage, exchanged information, and, immediately thereafter Villanueva went to get an estimate for her car damage.

Despite this testimony, Allstate chose not to ask Angarita about Villanueva's account of the accident, chose not to ask Angarita about any contact post-accident contact between Villanueva and Butler (after Angarita had just testified that Butler gave Villanueva his phone number at the scene of the accident), and chose not to ask Angarita about what Villanueva did with the car damage estimate obtained from Angarita's husband (as if it wasn't already apparent from Angarita's testimony that

the damage estimate Villanueva obtained was for Butler to pay). Allstate never broached these facts or inquired about the inconsistencies when it questioned Angarita, because it preferred to stay ignorant in hopes to avoid coverage and liability for the accident. Angarita cannot be found as having concealed material facts when she told the truth, when Allstate had every reason to know, but chose not to inquire about those facts, and when Allstate gave Angarita no reason to testify about them.

C. Allstate May Not Deny PIP Coverage Because It Purposely Kept Itself Ignorant of Material Facts

“An insurer is charged with the knowledge which it would have obtained had it pursued a reasonably diligent inquiry. An insurer should not be able to escape its contractual obligations by purposely keeping itself ignorant of essential facts.” *Bosko v. Pitts & Still, Inc.*, 75 Wn.2d 856, 864-865, 454 P.2d 229 (1969) *citing* *Union Ins. Exch., Inc. v. Gaul*, 393 F.2d 151 (7th Cir. 1968).

In *Union Ins. Exch., Inc.*, *supra*, the Court held that an insurer was estopped from rescinding the policy, even when the insured made two false representations, because the insurer possessed facts that would have put a prudent insurer on further inquiry that would have disclosed the falsity of the two critical answers:

Rescission or forfeiture is a drastic remedy and courts are ordinarily reluctant to grant it. Hostility to such relief was expressed by the Supreme Court in *Knights of Pythias v. Kalinski*, 163 U.S. 289, 298, 16 S.Ct. 1047, 1051, 41 L.Ed. 163:

If the company ought to have known of the facts, or with proper attention to its business, would have been apprised of them, it has no right to set up its ignorance as an excuse in order to secure forfeiture.

In this field knowledge includes constructive knowledge, so that rescission was unjustified here if plaintiff possessed sufficient facts to require it to make a further investigation.

Union Ins. Exch., Inc. v. Gaul, 393 F.2d at 154.

In this case, Allstate had sufficient information to compel further inquiry about the inconsistencies between Villanueva's false and Angarita's truthful testimonies. It should have asked Angarita about Villanueva's account of the accident and her false statements. Furthermore, Allstate had obtained a copy of Villanueva's cell phone records prior to Villanueva's EUO, but chose not to disclose these records to Angarita until after the EUOs and chose not to ask her any questions about them. With reasonable inquiry, Allstate would have easily ascertained Butler's phone number from those records, since Angarita testified that Villanueva was given Butler's phone number and that Villanueva was getting an estimate for her car damage for Butler. Instead, Allstate chose to remain ignorant:

As explained in *Columbian National Life Insurance Co. of Boston, Mass. v. Rodgers*, 116 F.2d 705 (10th Cir. 1940), *certiorari denied*, 313 U.S. 561, 61 S.Ct. 838, 85 L.Ed. 1521, an insurance company is chargeable with knowledge of facts which it ought to have known. As the court there explained (at p. 707):

"Knowledge which is sufficient to lead a prudent person to inquire about the matter, when it could have been ascertained conveniently, constitutes notice of whatever the inquiry would have disclosed, and will be regarded as knowledge of the facts."

Here we hold that this Insurer and its agent had sufficient information in their possession to awaken further inquiry.

Union Ins. Exch., Inc. v. Gaul, 393 F.2d at 155.

Since Allstate cannot show that Angarita misrepresented any material facts, it now asserts that Angarita deliberately concealed material information from Allstate. The gist of the alleged concealment was that Angarita did not tell Allstate that Villanueva asked her to lie (even though Angarita ignored Villanueva's request and told the truth). And while Angarita did not discuss this fact during her EUO, Allstate gave her no reason to do so and gave her no reason to think that Allstate did not believe her. Allstate outwitted itself by purposely not asking Angarita any questions about Villanueva's testimony. Any allegation of "concealment" was created solely by the inartful manner in which

Allstate chose to examine Angarita. Angarita answered every question asked of her truthfully.

Allstate may not avoid coverage, because it purposely did not ask Angarita about any of the material facts it claims she “concealed.” It certainly cannot claim ignorance of the fact that Villanueva contacted Butler after the accident, when Angarita testified that the two of them exchanged phone numbers and that Villanueva went to get an estimate for Butler. The logical extension of this testimony is that Villanueva eventually communicated this estimate to Butler.

Allstate’s assertion that Angarita’s “No” response to its question, “Is there anything you want Allstate to know about the injury and the accident that we haven’t spoken about” at the end of her EUO, amounts to concealment is absurd. App. Opening Brief, p. 27. If that were the case, then Allstate’s only duty is to ask that one question in every EUO, and concealment would be based upon whether the insured listed every material fact. Nonetheless, even if Angarita “concealed” material facts, she is still entitled to coverage as discussed below.

D. Even If Angarita Concealed Material Facts, The Terms Of Allstate’s Policy Still Provides For Coverage.

While Washington courts have held that intentional material misrepresentations and concealment of material facts can preclude an insured from recovery under an insurance policy, they have only done so if the policy itself contains a provision that provides for such an exclusion from coverage. See *Mutual of Enumclaw v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988); *Onyon v. Truck Ins. Exch.*, 859 F.Supp. 1338 (W.D. Wash. 1994). In other words, Courts will only exclude insurance coverage pursuant to an exclusionary provision in the policy. Despite Allstate's argument to the contrary, there is no statutory or common law basis for precluding coverage based on concealment, misrepresentation, and/or fraud by an insured. Any exclusion of coverage must be based upon a policy provision. See *McDonald Indus., Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 915 (1981); see also *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012). Furthermore, exclusions are strictly construed against the insurer. *Mid-Century Ins. Co. v. Henault*, 128 Wn.2d 207, 213 (1995); *Torgerson v. North Pacific Ins. Co.*, 109 Wn.App. 131, 137 (2001).

1. Interpretation of Insurance Contracts

Interpretation of language in an insurance policy is a question of law. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 423–24, 932 P.2d 1244

(1997) (citing *Rones v. Safeco Ins. Co. of Am.*, 119 Wn.2d 650, 654, 835 P.2d 1036 (1992)). Courts in Washington construe insurance policies as the average person purchasing insurance would, giving the language “a fair, reasonable, and sensible construction.” *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 627, 881 P.2d 201 (1994) (quoting *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 65, 882 P.2d 703, 891 P.2d 718 (1994)). Where a term is undefined, it is assigned its ordinary meaning. *Peasley*, at 424.

Some general principles of contract interpretation apply to insurance contracts. The court should read the contract as a whole, *Ellis Court Apartments Ltd. v. State Farm*, 117 Wn.App. 807, 814 (2003), in a fair, reasonable, and sensible manner as it would be understood by the average purchaser. *N.H. Indem. Co. v. Budget Rent-A-Car*, 148 Wn.2d 929 (2003). Undefined terms are given their “plain, ordinary, and popular” meaning. *Daley v. Allstate*, 135 Wn.2d 777, 784 (1998).

However, because of the disparity of bargaining power between an insurance company and the insured, insurance contracts are different and the law provides that courts should apply additional rules of construction not applicable to contracts entered into between parties of equal bargaining power. *Olympic Steamship Co.*, 117 Wn.2d at 52.

Insurance policies contain language which grants coverage, along with language which excludes or limits coverage. These different clauses are construed differently. Clauses granting coverage are to be read liberally in favor of providing insurance while exclusionary or limiting clauses “are to be ‘most strictly’ construed against the insurer in view of the fact that the purpose of insurance is to insure, and the contract should be construed so as to make it operative rather than inoperative.” *Aetna v. M&S Industries*, 64 Wn.App. 916 (1992); *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68 (1983), *modified on reconsideration*, 101 Wn.2d 830 (1984). Because “[e]xclusions from insurance coverage are contrary to the fundamental protective purpose of insurance,” Courts construe exclusions strictly against the insurer. *State Farm Fire & Cas. Co. v. Ham & Rye LLC*, 142 Wn.App. 6, 13, 174 P.3d 1175 (2007).

Exclusions from coverage are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning. *McDonald Indus., Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 915 (1981); see also *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012). Exclusions are strictly construed against the insurer. *Mid-Century Ins. Co.*

v. *Henault*, 128 Wn.2d 207, 213 (1995); *Torgerson v. North Pacific Ins. Co.*, 109 Wn.App. 131, 137 (2001).

Once the insured makes a prima facie showing that the loss falls within the scope of the policy, the burden is on the insurer to prove that the claimed loss is excluded by specific policy language. *McDonald v. State Farm*, 119 Wn.2d 724, 731 (1992). The insurance company bears the burden of proving that an exclusion applies. *Queen City Farms, Inc.*, 126 Wn.2d at 71. To the extent the policy contains inconsistent or conflicting terms, the conflict must be resolved in favor of the insured. *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413 (1998). "A clause in a policy is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." *Greer v. Northwestern Nat'l Ins. Co.*, 109 Wn.2d 191, 198 (1987) (quoting *Yadheim v. Continental Ins. Co.*, 107 Wn.2d 836, 840-41 (1987)). Ambiguous terms must be construed in favor of the insured, even though the insurer may have intended another meaning. *Yadheim*, 107 Wn.2d at 840-41, citing *Morgan v. Prudential Ins. Co.*, 86 Wn.2d 432, 435 (1976). An insured is entitled to favorable construction of ambiguous policy language – it must be read to provide rather than to deny coverage. *Queen City Farms, Inc.*, 126 Wn.2d at 86.

Washington courts say this rule has special force in the insurance context: Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence. *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), *reh'g denied*, 111 S. Ct. 803 (1991); *Emter v. Columbia Health*, 63 Wn.App. 378, 384 (1991), *rev. denied*, 119 Wn.2d 1005 (1992).

The result of applying these rules of construction is that when a policy term has more than one reasonable meaning, the meaning favorable to the insured must be used. It is irrelevant that one meaning is more reasonable than another or that the insurance company intended one over the other. As the Supreme Court said, "The industry knows how to protect itself and it knows how to write exclusions and conditions." *Boeing v. Aetna*, 113 Wn.2d 869, 887, 784 P.2d 507 (1990).

2. Allstate's Policy Is Severable Under Its "Fraud or Misrepresentation" Provision.

Allstate's "Fraud or Misrepresentation" provision states:

Fraud or Misrepresentation

This entire policy is void from its inception if it was obtained or renewed through material misrepresentation, fraud or concealment of material fact made with the intent to deceive. This means that Allstate may not be liable for any claims or damages that would otherwise be covered.

We may not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy.

This provision clearly contains two separate exclusionary clauses. The first excludes coverage for misrepresentations made before a loss and the second excludes coverage for misrepresentations made after a loss.¹ *See Allstate Ins. Co. v. Huston*, 123 Wash. App. 530, 538-539, 94 P.3d 358 (2004) (Distinguishing pre and post loss misrepresentations in "void for fraud" provisions).

Furthermore, the first exclusionary clause voids the "entire policy" from its inception if the policy was "obtained or renewed through material misrepresentation, fraud or concealment of material fact made with the intent to deceive." Thus, the policy is not severable under the

¹ All of the cases relied upon by Allstate involve insurance "void for fraud" provisions that do not distinguish between pre and post loss

first exclusion, and pre-loss misrepresentations connected with obtaining or renewing the policy voids the “entire policy.” Allstate admits that this pre-loss exclusionary provision does not apply to this case.

The second exclusionary clause voids coverage for post-loss misrepresentations and the plain language provides for a severable policy. In other words, the “entire policy” does not become void under the second exclusionary clause. Instead, only “coverage for *any insured who has made fraudulent statements*...in connection with any accident or loss for which coverage is sought” (emphasis added), “may not” be provided under the post-loss exclusionary clause.

In *Mut. of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d at 649-650, the Court recognized the distinction between severable and non-severable “void for fraud” policy exclusions and held that severability depends upon the policy language:

Whether a contract is entirely divisible depends largely on its terms and on the intention of the parties disclosed by its terms. *Saletic v. Stamnes*, 51 Wash.2d 696, 321 P.2d 547 (1958). The court, on pretrial motion, ruled that as a matter of law the policy was not severable. This reasoning seems to be based on the language of the policy. Section 6 of the policy contained the following language:

This entire policy is void if ...

misrepresentations and concealments. Allstate’s policy makes the distinction.

b. There has been fraud or false swearing ...

Many courts have upheld the same or similar provisions... **The clear language of Cox's policy provided that it was not severable.** Cox's material fraud voided the entire Clear Lake policy, and he is not entitled to any recovery.

Cox, 110 Wn.2d at 649-650 (emphasis added) (citations omitted). In comparison, the plain language of Allstate's exclusionary clause for post-loss misrepresentations provides that the policy is severable:

We may not provide coverage for **any insured who has made fraudulent statements or engaged in fraudulent conduct** in connection with any accident or loss for which coverage is sought under this policy.

Under this language, only "coverage for any insured *who has made fraudulent statements,*" may become void under the post-loss exclusionary clause. In no way can this language be construed to void the entire policy or coverage for all insureds.

Contrary to its own policy language, Allstate argues that its policy is not severable, so that Villanueva's misrepresentations may be imputed to Angarita to preclude coverage for Angarita. However, the plain language of Allstate's policy does not preclude coverage to any insureds who have NOT made any fraudulent statements and who have NOT engage in any fraudulent conduct. Furthermore, any fraudulent statements by Villanueva were not made "in connection...with a loss for which

coverage” for *Angarita* was sought, but were made in connection with a loss for which coverage for *Villanueva* was sought. Giving Allstate’s “void for fraud” provision its regular and ordinary meaning, Villanueva’s fraudulent conduct is severable and does not void Angarita’s coverage. Because “[e]xclusions from insurance coverage are contrary to the fundamental protective purpose of insurance,” Courts construe exclusions strictly against the insurer. *State Farm Fire & Cas. Co. v. Ham & Rye LLC*, 142 Wn.App. 6, 13, 174 P.3d 1175 (2007).

Allstate cites to a number of cases holding that under the language of some policies, the fraudulent acts of “any insured” precludes recovery by an innocent co-insured. However, Allstate’s exclusion does NOT read, “We may not provide coverage if any insured has made fraudulent statements or engaged in fraudulent conduct.” Unlike Allstate’s policy, all of the cases relied upon by Allstate involve policy language clearly stating that the intentional/fraudulent acts of any insured voids the entire policy.²

²See e.g. *Sales v. State Farm Fire & Cas. Co.*, 849 F.2d 1383, 1385 (11th Cir.1988), *rev'd on other grounds*, 902 F.2d 933 (11th Cir.1990) (“This entire policy shall be void if any insured has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance.”); *Amick v. State Farm Fire and Cas. Co.*, 862 F.2d 704, 705 (8th Cir. 1988) (“If you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss, then this policy is void as to you and any other insured.”); *Spezialetti v. Pacific Employers Ins. Co.*, 759 F.2d 1139, 1140 (3rd Cir. 1985) (“The insurance

Furthermore, all of the cases involve homeowners or business policies wherein the primary issue is whether the intentional/fraudulent acts of one spouse voids the policy as to the innocent other spouse. As later discussed, homeowners and business insurance policies are treated differently than automobile insurance policies in Washington.

Allstate's assertion that the language in its exclusionary provision is similar to the policy language involved in all of these other cases is absurd. The fact that Allstate's Opening Brief devotes only half a page (App. Opening Brief, p. 13) to discussing its own policy language, shows that Allstate would like this Court to focus as little as possible on its own policy. No doubt Allstate realizes that its "void for fraud" provision is not

shall not apply to loss or damage ... resulting from any dishonest act or omission by any insured..."); *K & W Builders, Inc. v. Merchants and Business Men's Mut. Ins. Co.*, 495 S.E.2d 473, 475, 255 Va. 5 (1998) ("This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact..."); *McCauley Enterprises v. New Hampshire Ins. Co.*, 716 F.Supp. 718 (D. Conn., 1989) (Misconstrued by Allstate and actually holds that the co-insureds were severable under the policy language); *State Farm Fire and Cas. Ins. Co. v. Kane*, 715 F.Supp. 1558 (S.D. Fla., 1989) ("The policy of insurance excluded 'losses caused or resulting from ... any fraudulent, dishonest or criminal act done by or at the instigation of any insured..."); *Bryant v. Allstate Ins. Co.*, 592 F.Supp. 39, 41 (E.D. Ky., 1984) ("This policy is void if any insured person intentionally conceals or misrepresents any material facts or circumstances, before or after loss."); *Fernandez v. Cigna Property and Cas. Ins. Co.*, 188 A.D.2d 700, 590 N.Y.S.2d 925 (N.Y.A.D. 3 Dept., 1992) ("We will not provide coverage if you or another covered person lied to us or concealed any information from us or engaged in fraudulent conduct, either before or after a loss.").

as broad as the ones at issue in those other cases, since Allstate avoids any discussion about how the plain language of its own policy exclusion applies to Angarita.

Allstate cannot void coverage to Angarita based upon what Courts have held in other cases construing other policies with broader exclusionary provisions involving homeowners insurance. Allstate's policy does NOT state, "We may not provide coverage *if any insured has made fraudulent statements.*" It states, "We may not provide coverage *for any insured who has made fraudulent statements.*" The Court must presume that Allstate knows how to protect itself and knows how to write exclusions and conditions. If Allstate intended for a non-severable policy exclusion, the policy would have stated the former instead of the later. Further, when the post loss misrepresentation provision is read in conjunction with the pre loss misrepresentation provision, it is clear that the "entire policy" is void only for pre loss misrepresentations, since the phrase "entire policy" is intentionally omitted from the post-loss exclusion language. As a result, Allstate's policy is severable under the terms of its own policy with regard to post loss misrepresentations.

3. Villanueva's Misrepresentations Do Not Void Angarita's Coverage Because Angarita's Policy with Allstate Is Separate And Distinct From Villanueva's Policy

Allstate's policy is also severable under Washington law. It is well recognized in Washington that in the automobile insurance context, a PIP policy is separate and distinct from a liability policy, and both are separate and distinct from a UIM policy, even if provided for by the same insurer under the same policy number.

In *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 655, 272 P.3d 802, 808 (2012), the Supreme Court recently held that an injured passenger's PIP policy was "separate" and "distinct" from the tortfeasor/driver's liability policy, even when provided by the same insurer. Relying on its previous decisions in *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 308, 88 P.3d 395, 396 (2004) and *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 882, 31 P.3d 1164, 1171 (2001), the *Matsyuk* Court held that since separate premiums were paid for PIP and liability coverage, the PIP and liability policies were separate and independent of each other:

Winters and *Hamm* recognize that PIP and UIM policies are distinct policies, even when provided by the same insurer. The same is true of liability coverage. Each policy is a separate silo, so to speak. Each offers discrete coverage, fulfills a particular need of the insured, and is based on a separate premium. See *Rones v. Safeco Ins. Co. of Am.*, 119 Wash.2d 650, 654–55, 835 P.2d 1036 (1992) (liability insurance); *Blackburn v. Safeco Ins. Co.*, 115 Wash.2d 82, 88–92, 794 P.2d 1259 (1990) (liability and UIM);

Keenan v. Indus. Indem., 108 Wash.2d 314, 322, 738 P.2d 270 (1987) (UIM and PIP).

Matsyuk, 173 Wn.2d at 655-656. In the context of a tortfeasor/driver and his injured passenger, the *Matsyuk* Court also rejected the notion that the PIP insurer and the liability insurer are the same entity standing only in the role of the tortfeasor's insurer, rejected the notion that an injured passenger is merely a third party beneficiary to the driver's policy, and overruled previous case law supporting these notions. *Matsyuk*, 173 Wn.2d at 654-655, *overruling Young v. Teti*, 104 Wn.App. 721, 725, 16 P.3d 1275, 1277 (2001).

A plaintiff and a defendant often have differing accounts of what happened in an accident, and when that occurs, one of them is lying. A passenger in or a pedestrian struck by a PIP-insured vehicle is entitled to PIP coverage under the law regardless of who is at fault for the accident. RCW 48.22.005(5)(b). If an insurer can deny no-fault PIP coverage to a passenger or a pedestrian struck by an insured vehicle, because the driver misrepresented facts, it would render statutorily mandated PIP coverage meaningless. Worse, under Allstate's argument, an insurer could deny all coverage if the passenger/pedestrian's account of the accident differs from the driver's account, because in that case, one of them is lying and it

doesn't matter which one, since either one of them lying will void the entire policy.

A *plaintiff's* right to PIP coverage should not depend upon the *defendant's* actions. Angarita and Villanueva's interests are adverse. Angarita's policy as an injured passenger is a separate and distinct policy from Villanueva's policy. This is consistent with the public policy behind PIP and UIM coverage. See *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 620, 160 P.3d 31 (2007) ("Our approach must recognize that UIM and PIP insurance are both creatures of public policy: coverages that every insurer writing automobile policies within the state must, by law, offer their insureds.").

Allstate's reliance upon *Mutual of Enumclaw v. Cox*, 110 Wn.2d 643 (1988), *Farmers Ins. Co. of Washington v. Hembree*, 54 Wn.App. 195 (1989), and *Farmers Ins. Co. v. Edie*, 52 Wn.App. 411 (1988) for the proposition that its automobile insurance policy is not severable is misplaced. First, as argued above, those cases involve distinguishable policy language that specifically provides for a non-severable policy. Second, they involve homeowners insurance, and are inapplicable to Allstate's automobile insurance policy in this case, since automobile insurance coverage is severable as a matter of law under *Matsyuk, supra*:

“Because different policies are implicated, and because the legislature has mandated automobile UIM and PIP coverage be offered, exclusions that are valid in other forms of insurance may be void and unenforceable in automobile coverage. For example, a family exclusion was found to be void in an automobile policy but enforceable in a homeowner's policy.

Sherry v. Fin. Indem. Co., 160 Wn.2d 611, 620, 160 P.3d 31, 35-36 (2007). See also *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 663, 999 P.2d 29, 31 (2000) (“[A]lthough the courts have found relevant statutes in the area of motor vehicle insurance (the financial responsibility act (FRA) (RCW 46.29) and the underinsured motorist statute (RCW 48.22.030)), they have failed to find similar statutes relating to homeowners' insurance. As a result, ‘family members’ exclusion clauses which have been held to violate public policy based on the FRA with respect to automobile insurance have been held not to violate public policy in the context of homeowners insurance” (citations omitted)).

Unlike homeowners and business insurance, automobile liability insurance, PIP and UIM insurance are regulated and mandated by statute and regulations. See RCW 46.29 (FRA); RCW 46.30 (Mandatory Liability Insurance); RCW 4.22.005 – 4.22.100 (PIP and UIM) and WAC Chapt. 284-30. Therefore, any exclusion in Allstate’s policy purporting

to void coverage to an innocent insured based upon a co-insured's fraud, should be void as against Washington law and public policy.

4. Allstate's "Fraud or Misrepresentation" Provision Does Not Apply To Concealment Of Material Facts After A Loss

Since Allstate's policy is severable under the plain language of the exclusionary provision and under *Matsyuk, supra*, Villanueva's violation of exclusionary provision cannot void Angarita's coverage. Therefore, the determinative issue is whether Angarita violated the Allstate's exclusionary clause. As indicated above, Allstate's "void for fraud" provision is actually two exclusionary provisions, the first applying to pre loss misrepresentations/concealments and the second applying to post loss fraud. Missing from the second provision (and the one applicable to this case) is any exclusion for "concealment of a material fact" post loss. The second exclusionary clause states that Allstate "may not provide coverage for any insured who has **made fraudulent statements or engaged in fraudulent conduct** in connection with any accident or loss for which coverage is sought" (emphasis added). It is undisputed that Angarita did not make any fraudulent statements or material

misrepresentations.³ “A ‘material misrepresentation’ is by its very nature manifested rather than concealed.” *Allstate Ins. Co. v. Huston*, 123 Wash. App. at 543. Thus, the issue is whether Angarita’s alleged concealment amounts to “fraudulent conduct” under the policy.

Allstate’s policy does not define the term “fraud.” However, Washington Courts have defined the elements of “fraud” in the civil context as follows:

(1) a representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) his right to rely on it, (9) his consequent damage.

Lambert v. State Farm Mut. Auto. Ins. Co., 2 Wn.App. 136, 141, 467 P.2d 214, *rev. denied*, 78 Wn.2d 993 (1970) (*citing Swanson v. Solomon*, 50 Wash.2d 825, 314 P.2d 655 (1957)). Since the elements of fraud require that there be a false representation, any *concealment* of material facts by Angarita cannot amount to fraudulent conduct as a matter of law. Therefore, Allstate’s “Fraud or Misrepresentation” exclusion is inapplicable to the alleged concealment of material facts by Angarita, even

³ Allstate introduced letters written by Allstate in its motion for reconsideration as evidence that Angarita asserted a false UIM claim. The trial court was within

if the allegation was true. Under the terms of the policy, Angarita is entitled to coverage from Allstate even if she did conceal material facts.

Although other insurance policies have provisions that void coverage for post loss concealments, Allstate's policy does not have such a provision and instead, makes the distinction between pre-loss concealment and post-loss fraud for purposes of precluding coverage. Pursuant to Allstate's policy, Allstate may not deny Angarita coverage, unless it can show that she "made fraudulent statements or engaged in fraudulent conduct." Under the policy, concealment of material facts post-loss is irrelevant for purposes of voiding coverage, if it doesn't amount to fraud.

Allstate does not argue that Angarita's alleged concealment amounts to fraud or fraudulent conduct. Instead it argues that under *St. Paul Mercury Ins. Co. v. Salovich*, 41 Wn. App. 653, 655-57, 705 P.2d 812, *rev. denied*, 104 Wn.2d 1029 (1985), "concealment is a different means to void a policy than fraud."⁴ First, Angarita agrees with Allstate that concealment is different from fraud. Allstate's policy specifically makes this distinction. Second, Angarita agrees that Courts have upheld the preclusion of coverage for the concealment of material facts post-loss

its discretion in refusing to consider this new evidence. Furthermore, letters authored by Allstate cannot be attributable to Angarita as her assertions.

when the policy language provides for it. In *St. Paul Mercury Ins. Co. v.*

Salovich, supra, the Court construed the following provision:

This entire policy shall be void if, **whether before or after a loss**, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

St. Paul Mercury Ins. Co. v. Salovich, 41 Wn.App. at 654 (emphasis added). Allstate's void for fraud provision is not so broad. Unlike the exclusionary provision in *Salovich* that does not distinguish between pre and post loss misrepresentations and concealments, Allstate's exclusionary provision makes the distinction and specifically does not apply to concealment of material facts after a loss.

The other cases Allstate relies upon for the proposition that it can preclude coverage on the basis of concealment post-loss, all involve exclusionary policy language that does not distinguish between pre and post loss concealment. In *Mut. of Enumclaw Ins. Co. v. Cox*, 110 Wn. 2d at 646, the void for fraud provision at issue stated:

Misrepresentation, Concealment or Fraud —This entire policy is void if, **whether before or after a loss**:

- a. An *insured* has willfully concealed or misrepresented:
 - 1) any material fact or circumstance concerning this insurance

⁴ Allstate's Opening Brief, p. 25

Id. (emphasis added).

In *Onyon v. Truck Ins. Exchange*, 859 F.Supp. 1338, 1340 (W.D. Wash., 1994), the void for fraud provision stated:

This entire policy shall be void in the event either or both of the following:

(a) if you have concealed or misrepresented, in writing or otherwise, any material facts or circumstances concerning this insurance.

(b) if you shall make any attempt to defraud us, **either before or after a loss.**

Id. (emphasis added).

All of the cases cited to by Allstate precluding coverage for concealment are inapplicable, because they all involve broader insurance policies that do not distinguish between pre-loss concealment and post-loss fraud. Pursuant to Allstate's own "void for fraud" provision, material concealments are only relevant pre-loss and only if connected with obtaining or renewing the policy. Allstate's pre-loss "void for fraud" provision is inapplicable to the coverage issues before this Court. Again, Allstate may not rely on the policy language of other policies to deny coverage for Angarita's alleged concealment.

Finally, *Ki Sin Kim v. Allstate Ins. Co., Inc.*, 153 Wn. App. 339, 223 P.3d 1180 (2009), is also inapplicable, because the Court voided the policy for fraud, not concealment. Despite Allstate's assertion to the

contrary, *Kim* involved the fraudulent statements (not concealment) by an insured of her ability to work and her claim for lost wages:

Here, like the insured in *Cox*, Kim misrepresented facts material to her claim: she misrepresented her ability to work as well as the nature and extent of her injuries following her visit to the emergency room. These are facts that a reasonable insurance company would have found important with respect to her wage loss and medical reimbursement claims. In her first two sworn statements, Kim stated unequivocally that she had not worked in any capacity since her accident. And, like *Cox*, Kim later admitted that, despite her previous claims to the contrary, she had worked several shifts at Yoko Teriyaki in September 2005, and had been paid cash for her efforts. Moreover, Allstate's investigator, Maucotel, obtained video surveillance of Kim working two four-hour shifts—one on September 20 and the other on September 22.

Ki Sin Kim v. Allstate Ins. Co., Inc., 153 Wn.App. at 358. Allstate argues that *Kim* is applicable because the insured “concealed” her ability to work. However, Allstate’s argument is circular. Kim’s concealment was only material and relevant because she made false representation about her ability to work and sought wage loss compensation from her insurer. Without her misrepresentations, Kim’s “concealment” of her ability to work would have been irrelevant. Allstate does not assert that Angarita made any misrepresentations. *Kim* is simply not applicable.

E. The Trial Court Correctly Precluded Allstate From Voiding Coverage For Villanueva’s *Liability To Angarita And Third Parties*.

Although the trial court voided coverage to Villanueva for her misrepresentations, it specifically held that coverage was voided “as to Villanueva only, not as to Plaintiff [Angarita] or third parties.” CP 496-497. Allstate argues that because Villanueva misrepresented facts when asserting her own UIM claim for hit and run, the policy is void not only as to Villanueva’s claims, but also as to any duties to defend or indemnify Villanueva for her liability in the accident.

Liability insurance is mandatory in Washington. See RCW 46.29 (Financial Responsibility Act (“FRA”)); RCW 46.30 (Mandatory Liability Insurance Act (“MLIA”). In holding that Allstate could not void Villanueva’s coverage for liability to third parties, the trial court considered RCW 46.29.490(6)(a) of the FRA which states:

(6) Provisions incorporated in policy. Every motor vehicle liability policy is subject to the following provisions which need not be contained therein:

(a) The liability of the insurance carrier with respect to the insurance required by this chapter becomes absolute whenever injury or damage covered by said motor vehicle liability policy occurs; **said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his or her behalf and no violation of said policy defeats or voids said policy.**

RCW 46.29.490(6)(a) (emphasis added); CP 358-359. While this statute applies to automobile liability policies certified under the FRA (see RCW 46.29.490(1)), Allstate did not dispute that Villanueva's policy was certified under FRA and there is no indication in the record that Villanueva's policy is exempt from the FRA. CP 355-360. Allstate's only argument to the trial court that RCW 46.29.490 is inapplicable was that the Courts in *Onyon, supra*, *Cox, supra*, and *Wickswat, supra*, upheld exclusions in insurance policies that void a policy for an insured's post loss material misrepresentations. CP 358-359. However, those cases did not involve automobile liability policies and did not discuss the FRA. Under the clear mandate of RCW 46.29.490(6)(a), Allstate may not void any liability coverage on account of Villanueva's misrepresentations made after the occurrence of the injury. The trial court did not err in applying RCW 46.29.490(6)(a) to preclude Allstate from voiding *liability* coverage for Villanueva due to her post loss misrepresentations. Notably, Allstate does not even mention RCW 46.29.490 or the FRA in its Opening Brief.

The trial court's decision is also consistent with the public policy behind the FRA and the MLIA in Washington. "Both the FRA and the mandatory liability insurance act express a strong public policy in favor of compensating the victims of road accidents." *Mendoza v. Rivera-Chavez*,

140 Wn.2d at 665. In *Mendoza v. Rivera-Chavez*, 140 Wn.2d at 666, the Court applied the public policy behind the FRA and the MLIA to void a felony exclusion provision in an automobile insurance policy. The Court held that while some exclusions may not violate the public policy behind the FRA, the analysis on whether an exclusionary clause violates the public policy is based on two broad rationales: 1) whether the exclusion clause was specifically bargained for and 2) whether there is increased risk to the insurer. *Id.* 140 Wn.2d at 666-668.

The *Mendoza* Court held that the felony exclusion clause at issue had not been bargained for:

An exclusion which is specifically bargained for will not violate the public policy of the FRA. In *Jester*, 102 Wash.2d 78, 683 P.2d 180, this court declined to strike down a provision in a motorcycle insurance policy which excluded liability coverage for claims made by passengers on the motorcycle as violating the public policy of the FRA. The rationale of this decision was that the coverage in question had been specifically rejected by the insured.

Jester is easily distinguishable from the case presently before us where there has been no argument that the exclusion was specifically bargained for, and there is no indication in the record that this is the case. Clerk's Papers at 333 (felony exclusion clause in insurance policy is in standard print which is used throughout the rest of the document).

Id. 140 Wn.2d at 667. Similarly, the exclusionary provision in this case purporting to exclude coverage for Villanueva's liability was also not

bargained for. As indicated in the numerous cases cited herein, “Void for Fraud” provisions in an insurance policy are standard.

The *Mendoza* Court also held that the felony exclusion clause at issue did not pose an increased risk to the insurer, because the exclusion operated retrospectively and because the exclusion struck at the heart of the public policy of the FRA:

This exclusion clause currently before the court pertains to no inherent and foreseeable increased risk to the insurer: a determination of whether the felonies of vehicular homicide or vehicular assault have occurred cannot be made until after injuries to the victim have been assessed. This assessment must necessarily occur *after* an accident and cannot be made in advance, at the time the insurance policy is purchased. . . .

The felony exclusion clause in the instant case strikes at the heart of the public policy of the FRA and the mandatory liability insurance act in a way that the clauses in cases where exclusions have been upheld do not. The objective of obtaining insurance coverage is to “protect the public from the ravages of the negligent and reckless driver.” *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wash.2d 327, 332, 494 P.2d 479 (1972). This is reflected in the policy of the FRA and the mandatory liability insurance act.

Mendoza v. Rivera-Chavez, 140 Wn.2d at 668-70. Similarly, the exclusion in this case purporting to exclude coverage for Villanueva’s liability to plaintiff and third parties operates retrospectively, specifically for *post loss* misrepresentations. Furthermore, the exclusion violates the heart of the public policy behind the FRA and the MLIA, by denying

mandatory liability coverage to innocent third parties injured by a negligent driver, who later lied about what happened in the accident.

Extending Allstate's exclusionary provision to deny coverage for Villanueva's liability to Angarita and third parties due to Villanueva's subsequent misrepresentations, would have the chilling effect of allowing insurers to deny liability coverage every time a defendant misrepresents what happened in an accident, misrepresents his speed, misrepresents the color of the traffic light, misrepresents his own damages, etc. One could only imagine the consequences of a jury's finding that the defendant had a red light, even though he testified that he had a green light – instant coverage denial.

Allstate can cite to no case in Washington wherein an insurer's duty to indemnify its insured for liability to other parties in a car accident can be voided when the insured subsequently misrepresents facts concerning what happened in the accident. The trial court was correct in holding that Allstate could not deny coverage for Villanueva's liability to Angarita and third parties. Its decision is mandated by RCW 46.29.490(6)(a) and consistent with the public policy behind the FRA and the MLIA.

F. Even If Villanueva's Liability Coverage Is Void, The Court's Order Voiding Coverage As to Villanueva Only, Entitles Angarita To UIM Coverage For Villanueva's Liability.

Even if the Court finds that Villanueva's liability coverage is void due to her misrepresentations, Angarita is entitled to *UIM coverage* for Villanueva's liability under Allstate's policy. If Villanueva's liability coverage is void, then Villanueva is an uninsured motorist and Angarita was a passenger in an "underinsured motor vehicle." RCW 48.22.030.

As argued above, Allstate's exclusionary provision for post loss misrepresentations is severable under the plain language of the exclusion, under Washington case law, and under the public policy of PIP/UIM coverage. Therefore, just as Angarita is entitled to PIP coverage despite Villanueva's misrepresentations, she is also entitled to UIM coverage under Allstate's policy. The Court should affirm the trial court's order holding that Villanueva's misrepresentations do not void any of Angarita's coverages under Allstate's policy.

G. Allstate Failed To Raise The Issue That Angarita Is Not Entitled To *Olympic S.S.* Fees Due To "Unclean Hands" Before The Trial Court.

Pursuant to RAP 2.5(a), the appellate court may refuse to review any claim of error which was not raised in the trial court. *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005). The decision to review is

discretionary under these circumstances. *Id.*; RAP 2.5(a). In this case, Angarita moved for attorney fees pursuant to *Olympic S.S.* after prevailing on the insurance coverage issue, and in its opposition, Allstate failed to raise the argument that Angarita is not entitled to *Olympic S.S.* fees for having “unclean hands.” CP 500-511. This argument is raised by Allstate for the first time on appeal. The Court of Appeals should exercise its discretion and refuse to hear this new argument.

In any event, since the trial court specifically found that Angarita was entitled to *Olympic S.S.* attorney fees despite Allstate’s allegation that she concealed material facts, it is presumed that the trial court did not find that Angarita had “unclean hands.” CP 531-533. While the decision regarding whether *Olympic S.S.* fees are applicable is reviewed de novo (*Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn.App. 666, 681, 285 P.3d 892 (2012)), the issue of whether a party has “unclean hands” is an equitable matter of broad discretion by the trial court, which should not be disturbed on appeal absent abuse of discretion. *See Sac Downtown Ltd. P'ship v. Kahn*, 123 Wn.2d 197, 204-205, 867 P.2d 605, 609 (1994); *Rupert v. Gunter*, 31 Wn.App. 27, 30, 640 P.2d 36 (1982); *Blair v. WSU*, 108 Wn.2d 558, 564, 740 P.2d 1379 (1987). In this case, Allstate does not dispute the applicability of *Olympic S.S.*, *supra*. Instead, it argues that the

trial court erred by not finding sua sponte that Angarita had “unclean hands” precluding her from *Olympic S.S.* fees.

First, the trial court did not abuse its discretion in not finding “unclean hands” precluding Olympic S.S. fees, because Allstate never raised the argument before the trial court. Therefore, Allstate failed to preserve for appeal what it now claims is reversible error by the trial court. Second, the facts in this case do not support a finding of unclean hands by Angarita. She told the truth, and Allstate chose to be ignorant. The trial court did not abuse its discretion by *not finding* “unclean hands” by Angarita. Third, Allstate misstates the holding in *Wellman & Zuck, Inc. v. Hartford Fire Ins. Co, supra*. The Court in *Wellman & Zuck, Inc.* did not “[hold] that an insured was not entitled to recover *Olympic Steamship* fees due to ‘unclean hands.’” App. Opening Brief, p. 35. Instead the Court in *Wellman & Zuck, Inc.* did not award *Olympic S.S.* fees, because the insured did not prevail on the coverage issue. *Wellman & Zuck, Inc.*, 170 Wn.App. at 681. That case is simply not applicable.

H. Angarita is Entitled to Attorneys Fees And Costs on Appeal.

An award of fees is appropriate "in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract" *Estate of Jordan v. Hartford*

Co., 120 Wn.2d 490, 508, 844 P.2d 403 (1993); *See also Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). The issues presented in this case involve Allstate's denial of insurance coverage to Angarita. Angarita is entitled to attorney fees on appeal pursuant to *Olympic S.S., supra.*; RAP 18.1.

V. CONCLUSION

The trial court rulings ought to be affirmed in all respects. Allstate should not be able to escape its contractual obligations by purposely keeping itself ignorant of material facts. Furthermore, even if Angarita concealed material facts after the accident and even if the policy is void as to Villanueva, Angarita is entitled to coverage and Allstate must provide coverage for Villanueva's liability. This is mandated under the plain language of Allstate's policy, Washington law, and the public policy behind the FRA, the MLIA, and UIM and PIP coverage.

Respectfully submitted this 4th day of October, 2013.



Angela Wong WSBA 28111
Attorney for Respondent Angarita

CERTIFICATE OF SERVICE BY MESSENGER

I hereby certify under penalty of perjury under the laws of the State of Washington that on October 4, 2013, the foregoing was delivered to ABC Legal Messenger Services with instructions to serve the foregoing document on the following parties by October 4, 2013:

Rory Leid, III Attorney at Law 1000 – 2 nd Ave., Suite 1300 Seattle, WA 98104 Attorney for Appellant Allstate Indemnity Company	David Wieck Wieck Schwanz 400 112th Ave. N.E., # 340 Bellevue, WA 98004 Attorney for Defendant Perla Villanueva
Rod Hollenbeck Hollenbeck Lancaster Miller 15500 SE 30 th Place, # 201 Bellevue, WA 98007 Attorney for Intervenor 21 st Century Ins.	Michael Guadagno Nicoll Black & Feig 1325 Fourth Ave., # 1650 Seattle, WA 98101 Attorney for Defendant 21 st Century Ins.
Pauline Smetka Helsell Fetterman 1001 4 th Ave., Suite 4200 Seattle, WA 98154 Attorney for Defendant Jeffrey Butler	

Dated October 4, 2013.



Angela Wong
WONG BAUMAN LAW FIRM, PLLC
1100 Dexter Avenue North, Suite 100
Seattle, Washington 98109
206-788-3000