

NO. 72947-1-1
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ALLSTATE INSURANCE COMPANY, a foreign insurance company,

Plaintiff,

vs.

BANK OF AMERICA, a foreign corporation,

Defendant.

BANK OF AMERICA, a foreign corporation,

Third-Party Plaintiff,

vs.

EFLEDA PAZ,

Third-Party Defendant.

EFLEDA PAZ,

Appellant/Fourth-Party Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY, a foreign insurance company,

**Respondent/Fourth-Party
Defendant.**

**APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Monica J. Benton, Judge**

BRIEF OF RESPONDENT

REED McCLURE

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I. INTRODUCTION

In reference to this case there appears to be multiple instances of disregard of appellate procedure on behalf of Paz. Allstate Insurance Company ("Allstate") asks this Court to dismiss this appeal and reject the arguments made by Ms. Paz. If this Court reaches any of the issues on appeal, this Court should affirm.

Allstate also asks this Court to award fees under RAP 18.9 for this frivolous appeal and award sanctions for Paz's multiple violations of RAP 10.3.

II. RESTATEMENT OF ISSUES

1. Should this Court dismiss the appeal because Paz has failed to present any arguments for the Court to consider?
2. Should this Court award attorney fees to Allstate for this frivolous appeal?
3. Should this Court award sanctions under RAP 10.7 for Paz's multiple violations of RAP 10.3?
4. Should this Court affirm where the superior court properly granted summary judgment and denied Paz's motion for reconsideration?

III. STATEMENT OF CASE

Efleda Paz purchased a Landlords Package policy from Allstate for property located in Kent, Washington. (CP 2) Fernando & Efleda Paz were the named insureds on the policy and Select Portfolio Servicing Inc Its Successors &/or Assigns ("SPS") was listed as the Mortgagee on the policy. (CP 2, 131) In August 2010, Allstate received notice from Fernando Paz of damage done by former tenants to the insured property in Kent, Washington. (CP 2) Allstate opened a claim for the August 2010 loss. (CP 2)

After investigating and adjusting the claim, Allstate paid for the damages. (CP 2, 20) Allstate issued two checks payable to Fernando & Efleda B. Paz and SPS. (CP 2, 9, 142) Both checks were endorsed by Efleda Paz and presented for and accepted for deposit by the Bank of America. (CP 2, 9, 142) There was no endorsement from SPS. (CP 2, 9, 142) Despite the fact that only one payee had endorsed the checks, Bank of America processed and cashed the checks. (CP 2, 9, 142)

In August 2012, SPS demanded that Allstate pay the check amounts to it. (CP 2) Allstate resolved the demand by issuing payment to SPS. (CP 2) Allstate then filed a complaint against the Bank of America for conversion and negligence. (CP 1-7) The Bank of America answered and asserted a third party claim against Efleda Paz. (CP 140) Efleda Paz

filed the Fourth Party Complaint against Allstate on January 14, 2014. (CP 140-44) Paz asserted a cause of action for civil liability for unlawful issuance of checks or drafts and a cause of action for negligence. (CP 142-43)

Allstate moved for summary judgment on the grounds of statute of limitations and failure to state a claim upon which relief could be granted. (CP 8-15) Ms. Paz agreed to dismiss her claim for civil liability for unlawful issuance of a check. (CP 19) She also conceded that her negligence claims were barred by the statute of limitations. (CP 19) Ms. Paz opposed the motion arguing the one-year suit limitation clause was void as against public policy. (CP 21-23) She also asked for leave to amend her complaint to assert an Insurance Fair Conduct Act ("IFCA") claim. (CP 19)

On October 17, 2014, the King County Superior Court dismissed Ms. Paz's fourth party complaint against Allstate because the complaint was barred by the statute of limitations. (CP 52-53)

Ms. Paz moved for reconsideration raising new arguments. (CP 55-114) She argued that Allstate had allegedly withheld insurance policies and "insurance binders" from the Pazes. (CP 56-57) The superior court denied Ms. Paz's motion for reconsideration on December 12, 2014. (CP 124-25) Ms. Paz filed a Notice of Appeal. (CP 152-55)

Allstate and the Bank of America settled the remaining claims. On February 20, 2015, a Stipulation and Order of Dismissal with Prejudice was entered dismissing all remaining claims. (CP 156) Paz did not file a motion for discretionary review. And Paz did not file any further Notice of Appeal. This Court's commissioner determined the appeal was timely commenced.

IV. ARGUMENT

A. STANDARD OF REVIEW.

This case comes to the Court from a summary judgment ruling. This Court's review is *de novo*. *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993), *cent. denied*, 510 U.S. 1047 (1994). Summary judgment is appropriate if the record demonstrates no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). There is no factual dispute and Allstate was entitled to judgment as a matter of law because Paz's claims were barred by the statute of limitations.

This case also involves a motion for reconsideration. Reconsideration motions are addressed to the sound discretion of the trial court and this Court will not reverse a superior court's ruling absent a showing of manifest abuse of discretion. *Perry v. Hamilton*, 51 Wn. App.

936, 938, 756 P.2d 150, *rev. denied*, 111 Wn.2d 1017 (1988). A court abuses its discretion when its decision is based on untenable grounds or reasons. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639, *rev. denied*, 139 Wn.2d 1005 (1999). The superior court properly exercised its discretion and denied the motion for reconsideration. This Court should affirm.

B. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE WERE NO ISSUES OF MATERIAL FACT AND ALLSTATE WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

This Court should affirm the summary judgment order. Ms. Paz's claims were barred by the statute of limitations. Ms. Paz conceded her negligence claim was not timely commenced. (CP 24) And the one-year suit limitation clause was enforceable and barred her lawsuit. Summary judgment was properly granted.

In this appeal, Paz has not made any arguments in opposition to the summary judgment motion. She has thus abandoned the arguments she made to the superior court. *Talps v. Arreola*, 83 Wn.2d 655, 657, 521 P.2d 206 (1974) (issue abandoned when issue not argued or supported by authority). Nevertheless in an exercise of caution because this Court's review is *de novo*, Allstate addresses the arguments Ms. Paz made to the superior court.

The one-year suit limitation in the insurance policy was valid and enforceable. (CP 138) Washington courts have consistently upheld contractual limitation provisions in insurance contracts. *Panorama Village Condominium Owners Ass 'n v. Allstate Ins. Co.*, 144 Wn.2d 130, 138-39, 26 P.3d 910 (2001); *Hassett v. Pennsylvania Fire Ins. Co.*, 150 Wash. 502, 508, 273 P. 745 (1929); *O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. App. 516, 529-31, 125 P.3d 134 (2004); *Wothers v. Farmers Ins. Co. of Wash.*, 101 Wn. App. 75, 79-80, 5 P.3d 719 (2000); *Simms v. Allstate Ins. Co.*, 27 Wn. App. 872, 873-74, 877, 621 P.2d 155 (1980). When a contract has a limitation period, the limitation period prevails over a general statute of limitations. *Yakima Asphalt Paving Co. v. Department of Transp.*, 45 Wn. App. 663, 666, 726 P.2d 1021 (1986), *rev. denied*, 107 Wn.2d 1029 (1987). Here the policy's one-year suit limitation applied.

It is undisputed that Paz did not commence her lawsuit within one year of the August 2010 loss. It is also undisputed that Paz did not commence her lawsuit within one year of the last effective date of the 2010-2011 policy. She did not bring the lawsuit until January 2014. (CP 140-44) Her lawsuit was untimely and was properly dismissed.

At the superior court, Ms. Paz argued the one-year suit limitation clause violated public policy citing *Hunter v. North Mason High School*,

12 Wn. App. 304, 529 P.2d 898 (1974), *aff'd*, 85 Wn.2d 801, 539 P.2d 845 (1975). *Hunter* is not applicable, nor does it hold the policy suit limitation clause is void. *Hunter* involved a case where plaintiff had *not* complied with a statute requiring a 120-day notice of claim before filing suit. The Washington Supreme Court held the statute was discriminatory and therefore unconstitutional. 85 Wn.2d 810, 811, 539 P.2d 845 (1975). There are no constitutional issues involved here.

At the superior court, Ms. Paz argued she fits a special category of litigants—non-native English speaker with little education—who are entitled to an exception from the one-year limitation provision. Nothing in *Hunter* supports her argument. And her argument is contrary to other established Washington law. Parties have a duty to read contracts. *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973). In Washington, policyholders have an affirmative duty to read their insurance policies and be on notice of the policy's terms and conditions. *Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245, 257, 928 P.2d 1127 (1996), *rev. denied*, 131 Wn.2d 1018 (1997). The superior court properly rejected Paz's challenge to the one-year suit limitation and granted summary judgment.

The superior court also properly dismissed the negligence claim on summary judgment because Ms. Paz conceded the claim was not timely

commenced. Ms. Paz was not entitled to leave to amend her complaint to add an Insurance Fair Conduct Act ("IFCA") claim because she had no basis to support an IFCA claim and it too was barred. An IFCA claim, like a negligence claim, has a three-year statute of limitations. *Walker v. Metropolitan Prop. & Cas. Co.*, 2013 WL 942554, at *5 (W.D. Wash. Mar. 8, 2013). So Ms. Paz's concession that her negligence claim was time barred applies equally to any IFCA claim.

The superior court properly granted summary judgment and dismissed Paz's lawsuit. This Court should affirm.

C. THE SUPERIOR COURT PROPERLY EXERCISED ITS DISCRETION AND DENIED PAZ'S RECONSIDERATION MOTION.

The superior court properly exercised its discretion and denied Paz's reconsideration motion because (1) the materials presented in the reconsideration motion were not new, (2) there was no violation of WAC 284-30-350 or WAC 284-30-560, and (3) any possible claim for violation of the WACs was time barred. This Court should affirm.

A party may not use a CR 59 motion for reconsideration to propose new theories that could have been raised before entry of an adverse decision. *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999). A trial court properly denies a motion for reconsideration based on "newly discovered evidence" (CP 58) when that evidence was

available at the time of the summary judgment. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639, *rev. denied*, 139 Wn.2d 1005 (1999); *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989). The *Wagner* court explained:

Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence.

95 Wn. App. at 907, *citing Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203, 810 P.2d 31, *rev. denied*, 117 Wn.2d 1017 (1991).

Ms. Paz's reconsideration motion was based on allegedly "new" evidence. (CP 56-61) Nothing in the motion was new. Ms. Paz had every opportunity to present the reconsideration arguments and materials in her summary judgment response. The declaration of Fernando Paz and the attachments were not new evidence. Everything stated in the declaration was based on events that occurred long before the summary judgment hearing. Ms. Paz offered no explanation or rationale why the reconsideration motion materials were not presented in response to the summary judgment motion.

The argument in Paz's motion for reconsideration (that Allstate allegedly had not provided the Pazes with copies of their insurance policies) is refuted by Paz's own fourth party complaint. Paz must have

had the policies because she based her Fourth Party complaint on the policies. Ms. Paz specifically alleged that Fernando and she were the named insured on Landlord policies issued by Allstate in 2009, 2010, and 2011. (CP 141, 4th Party Complaint, ¶ 3.1) Allstate specifically admitted those allegations. (CP 147, Answer to 4th Party Complaint, ¶ [3].1)

In addition, Ms. Paz attached the relevant portions of the 2010 Allstate policy as exhibit 1 to her response to the summary judgment. (CP 27-35) The 2010 policy is the only insurance policy at issue in this case. The record established that nothing in the motion for reconsideration was new. The record established that the Pans had copies of their insurance policies. And most importantly, the Pazes had a copy of the policy which was in effect at the time of the August 2010 date of loss.

Moreover, Ms. Paz offered no explanation or rationale for why she had not previously submitted the reconsideration motion materials. In fact, the motion for reconsideration acknowledged that the reconsideration motion materials were actually available to Paz. The motion stated: “[a]fter an order granting summary judgment against Ms. Paz was entered, Mr. Paz reviewed his correspondence with Allstate. . .” (CP 57) Ms. Paz's reconsideration motion materials were available months and years ago. She had ample opportunity to submit them in response to the

summary judgment. *Wagner Dev. v. Fidelity & Deposit*, 95 Wn. App. at 907. For all these reasons, the superior court correctly rejected and denied Paz's motion for reconsideration.¹

The superior court also properly exercised its discretion and denied Paz's reconsideration motion because the WACs alleged (a) did not apply, and (b) assuming they applied, the WACs were not violated. Ms. Paz argued that because Allstate's agent purportedly did not send Mr. Paz the copies of the insurance policies he requested, Allstate somehow did not comply with WAC 284-30-560 (requiring binders to be written and provided to insured). Ms. Paz also argued that this alleged conduct was also a failure to disclose all pertinent benefits, coverages, or other provisions under which a claim is presented. (CP 57-60) Ms. Paz contended that such conduct violates WAC 284-30-350(1).

The superior court properly denied the motion for reconsideration because neither WAC 284-30-560 nor WAC 284-30-350(1) applies. The e-mails attached to Mr. Paz's declaration are not sent in the context of a claim under an insurance policy. The e-mails show general inquiries to

¹ To the extent that Mr. Paz's September 2011 accident could be construed as justification for the late submitted materials, there was nothing corroborative in the record to suggest that at any time Mr. Paz was actually disabled or incapacitated as required under RCW 4.16.190 and RCW ch. 11.88. (CP 71-76) In fact, the records show that in 2012, he was sending e-mails to Mitzi Majano, an Allstate insurance agent (CP 85-87)

an Allstate agent seeking extra copies of the insurance policies. (CP 78-114)

Mr. Paz says he wants the copies of the policies because he and Ms. Paz are reviewing the coverages and the premiums for the policies. (CP 78-98) Mr. Paz's requests to an Allstate agent are not in the context of any claim.

It was undisputed that the Allstate policies for the Paz's Kent property were in effect from 2009 to 2011. Ms. Paz alleged she had purchased Allstate policies in effect from November 22, 2009 to November 22, 2011. ¶ 3.1 Paz Fourth Party Complaint (CP 141) Allstate admitted the allegations of ¶ 3.1. (CP 147)

The alleged conduct would not support a basis for relief The e-mails show that the policy materials were sent to Mr. Paz. (CP 81) The first e-mail included in the materials is dated March 11, 2010. (CP 79) Mr. Paz is requesting the Allstate agent to send information on all coverages. (CP 79) On June 30, 2010, Mr. Paz made another request for insurance information. (CP 81) Mitzi Majano wrote:

Fernando, those documents I sent them to you via mail, last time that you requested them. Unfortunately I can not send that information directly anymore, check your regular mail because copies of all your policies must have arrived by now. The other way for you to obtain direct access to your insurance policy is through the <http://wwwv.allstate.com/>

you'll need to register and enter your policy number for you to be able to access it.

(CP 81) Thus, the information requested in 2010 was sent prior to June 30, 2010. And Mr. Paz was provided with two other options for getting the insurance information: mail and internet. (CP 81) There were no violations of WAC 284-30-560 or WAC 284-30-350(1). This Court should affirm the superior court's denial of the reconsideration motion.

D. THIS COURT SHOULD REJECT PAZ'S NEWLY RAISED WAC 284-30-380(5) ARGUMENT.

Paz's argument on appeal is premised entirely on an alleged violation of WAC 284-30-380(5). Her argument is that the one-year policy limitation is only effective if an insurer provides written notice 30 days before the statute runs. (App. Br. at 9-11) This argument is based on WAC 284-30-380(5) and Allstate's alleged failure to comply with WAC 284-30-380(5). Ms. Paz did not assert this argument in her summary judgment response. (CP 18-24) WAC 284-30-380(5) was not even cited. *Id* Her only challenge to the one-year policy limitation was that it purportedly violated public policy. (CP 21-23)

Pursuant to RAP 2.5(a), this Court will only review issues raised in the superior court. Paz did not raise the WAC 284-30-380(5) issue in the superior court. Therefore this Court should reject the argument and the entire appeal.

In her motion for reconsideration, Ms. Paz raised new arguments based on purportedly "newly discovered evidence." (CP 55-61) She argued that Allstate allegedly had not issued insurance binders and contended that the alleged conduct violated WAC 284-30-350(1) and 284-30-560(1)(d). (CP 59-60) Ms. Paz did not explain how any presumed violations of WAC 284-30-350(1) or 284-30-560(1)(d) related to the one-year policy suit limitation. (CP 55-61) Most significantly, Ms. Paz did not cite WAC 284-30-380(5). *Id.*

Assuming that this Court chooses to address the WAC 284-30-380(5) arguments, the argument does not support a reversal. Paz submits, without any record reference or support in the record, that: (a) a "settlement offer" was made in September 2010 and Paz rejected the offer; (b) Allstate told Paz to stop e-mailing and to stop calling; (c) that the Allstate "adjuster did not write the instructions given to Paz," and (d) the Allstate adjuster said "they needed more time to be able to do their job." (App. Br. at 3-4) None of these statements are supported by anything in the record. For this reason alone, the argument should be rejected.

Again if this Court chooses to consider Paz's WAC 284-30-380(5) argument, Ms. Paz is not entitled to relief Allstate was not negotiating any settlement with Paz in 2011. Therefore, WAC 284-30-380(5) does

not apply here. The superior court's order denying the motion for reconsideration should be affirmed.

E. ALLSTATE IS ENTITLED TO FEES UNDER RAP 18.9 FOR PAZ'S FRIVOLOUS APPEAL.

Allstate requests attorney fees for this frivolous appeal. RAP 18.9 authorizes an award of terms or compensatory damages against a party who “uses these rules for the purposes of delay, files a frivolous appeal, or fails to comply with these rules. . .” In addition, CR 11 discourages filings that are not “well grounded in fact” and “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,” and that are “not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” The rule permits a court to award sanctions, including expenses and attorney fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. *See Wilson v. Henkle*, 45 Wn. App. 162, 174, 724 P.2d 1069 (1986).

The following considerations apply in determining whether an appeal is frivolous:

- (1) A civil appellant has a right to appeal under RAP 2.2; all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no

debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187, *rev. denied*, 94 Wn.2d 1014 (1980). Considering this appeal as a whole, it is frivolous. There are no debatable issues upon which reasonable minds would differ. The appeal is so totally devoid of merit that there is no reasonable possibility of reversal. Allstate asks for attorney fees for having to respond to this frivolous appeal.

F. SANCTIONS ARE WARRANTED UNDER RAP 10.7 FOR PAZ'S IMPROPER BRIEF.

This appellate proceeding has been pending since January 2015. This proceeding has languished due to Paz's multiple and ongoing disregard of appellate procedure. And once Paz filed an appellate brief accepted by this Court, the brief is woefully deficient. An award of sanctions is warranted.

Appellant has repeatedly failed to comply with the Rules of Appellate Procedure. Appellant repeatedly failed to comply with the Court's orders. The repeated failures have delayed the case. The repeated failures have caused Allstate to incur fees of at least \$3,000. *See* Respondent Allstate Insurance Company's RAP 18.9(a) and (c) Motion to Dismiss or for Sanctions and Declaration of Marilee C. Erickson in

Support of Respondent Allstate's Motion, filed on December 1, 2015. Paz's brief is only the latest example of a series of irregularities and RAP violations.

RAP 10.7 states the appellate court “will ordinarily impose sanctions on a party or counsel for a party who files a brief that fails to comply with these rules.” Paz's brief violates many RAPs.

RAP 10.3(a)(4) requires a “concise statement of each error a party contends was made by the trial court.” Paz's assignments of error are confusing and anything but concise. (App. Br. at 1-3) The assignments also include a reference to appellate proceedings, i.e., Allstate's response to the motion for discretionary review. (App. Br. at 2)

The brief violates RAP 10.3(a)(5) which requires record references for each factual statement. Paz's brief does not contain a single record reference.

RAP 10.3(a)(6) requires argument, citation to legal authority, and record references. Other than legal citations for the standard of review (App. Br. at 5-6), the argument section contains no citation to legal authority. (App. Br. at 6-11) And again, the argument does not contain a single record reference.

The appendices to the brief include discovery materials which were not part of the superior court record: Paz's Responses to Allstate's

Requests for Admissions. An appendix may not include materials not contained in the record on review without permission from the appellate court.² RAP 10.3(a)(8)

This case involves review of a summary judgment order and order denying motion for reconsideration. This Court will consider only those materials considered by the superior court. RAP 9.12. The discovery materials were not called to the superior court's attention on summary judgment. (CP 52-53) Nor were the discovery materials submitted on the reconsideration motion. (CP 124-25) No discovery materials are part of the appellate record. And no discovery materials were filed with the superior court. Discovery materials are not to be filed with the superior court. CR 5(d)(1). The appendix violates RAP 10.3(a)(8).

For all these reasons and the reasons listed in Allstate's Motion to RAP 18.9(a) and (c) Motion to Dismiss or for Sanctions, Allstate asks this Court to award sanctions of at least \$3,000 payable either to the Court or to Allstate.

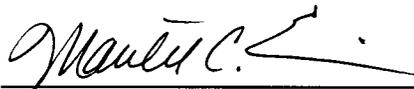
² RAP 10.3(a)(8) contains an exception and reference to RAP 10.4(c). The RAP 10.4(c) exception does not apply.

V. CONCLUSION

This Court should decline to consider Paz's argument and dismiss the appeal. If the Court reaches the issues raised by Paz, this Court should affirm the superior court's orders. This Court should conclude the appeal is frivolous and award attorney fees to Allstate under RAP 18.9. Finally, this Court should award sanctions of at least \$3,000 under RAP 10.7.

DATED this 16th day of March, 2016.

REED McCLURE

By 

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