

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

EDDIE OHMS and AUDREY OHMS, individually and their marital community,

Appellants,

-vs-

KPS HEALTH PLANS,

Respondent.

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STATE OF WASHINGTON
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DEPUTY

APPELLANTS' REPLY BRIEF

ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT
Honorable Leonard W. Costello, Judge

Appearances:

Dylan E. Jackson, WSBA #29220
Wilson Smith Cochran Dickerson
1700 Financial Center, 1215 Fourth Avenue
Seattle, WA 98161
Telephone: 206.623.4100
Fax: 206.623.9273
Electronic Mail: jackson@wscd.com
Counsel for Appellants

Bradley A. Maxa
Gordon, Thomas, Honeywell, Malanca,
Peterson & Daheim, LLP
1201 Pacific Ave., Suite 2100
Tacoma, WA 98401
Telephone 253. 620.6431
Fax: 253.620.6565
Electronic Mail: bmaxz@gth-law.com
Counsel for Respondent

John M. Fitzpatrick
Buxbaum, Daue & Fitzpatrick, PLLC
228 West Main Street, Suite A
Missoula, MT 59802-4345
Telephone: 406.327.8677
Fax: 406.829.9840
Electronic Mail: jfitzpatrick@bdf-lawfirm.com
Pro Hac Counsel for Appellants

Filed: _____

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I. INTRODUCTION

The question presented is whether an occupational injury exclusion in a health insurance contract precludes coverage for health care expenses associated with injuries Eddie Ohms sustained in a motor vehicle accident, even though it is undisputed that at the time of the accident he was:

1. “Off duty;”
2. Not carrying a load;
3. Not going to get a load;
4. Not being paid;
5. Not working;
6. Driving his personally-owned vehicle; and
7. Free to drive wherever he wished.

KPS submits that these undisputed facts do not matter because Exclusion 28 “does **not** state that Ohms must have been working, on duty, carrying a load or being paid at the time of the injury.” (KPS’ brief at p. 11)(emphasis in original.) With respect, KPS’ approach would turn decades of jurisprudence regarding interpretation of exclusions in insurance policies upside down.

KPS continues to ignore the fact that its exclusion applies only to an “occupational injury” and contains the phrase “in the course of”

employment. With blinders on, KPS urges that Exclusion 28 is breathtakingly broad and applies to any situation, no matter how thinly related to one's work. Under KPS' interpretation, it is difficult to imagine a situation where a clever insurance adjuster could not argue that Exclusion 28 precludes coverage.

KPS also refuses to acknowledge that Mr. Ohms can wear different hats when driving his personally-owned truck. One hat is his "working hat," which he only wears when "on duty." The other is his "non-working hat" that he wears when driving his truck while "off duty." When "off duty," Mr. Ohms drives his truck as a personal vehicle, free from any control or direction of his employer, System Transport. The undisputed facts establish that Mr. Ohms was "off duty" and driving his personal vehicle when the Louisiana accident occurred. He was just as "off duty" as he would have been taking the truck on a camping trip.

KPS takes substantial liberties with the facts in attempting to make its case. It repeatedly suggests that Mr. Ohms was injured on a "business trip." Mr. Ohms is only on a "business trip" when "on duty."

When “off duty,” he is free to do whatever he wishes without any control from his employer. In this case, the “business trip” ended when Mr. Ohms and his truck were put out of commission in the Florida accident. At this point, he went “off duty” and drove not to his “home base” for work in Spokane, but to his personal home in Darby, Montana. Mr. Ohms’ boss, Dennis Williams, testified that the Louisiana accident was not related to Mr. Ohms’ work. (CP 110) KPS has not come forward with any **fact** to controvert Mr. Williams’ testimony. Argument and speculation by the insurance adjuster are insufficient.

KPS also ignores the fact that driving 2,500 miles “off duty” and without a load is not part of Mr. Ohms’ job. (CP 101) It is also apparent that KPS mistakenly believes that Mr. Ohms works independently, outside of his contract with System Transport. Under the lease agreement with System Transport, Mr. Ohms is not permitted to work for anyone, including himself, other than System Transport. (CP 102) When “off duty” Mr. Ohms is not permitted to work, period.

In what appears to be an attempt to influence this Court with

irrelevant information, KPS points out that Mr. Ohms paid the over-\$50,000 in medical expenses out of his own pocket from proceeds of a settlement with the tortfeasor in the Louisiana accident. KPS omits the fact that Mr. Ohms sustained about \$50,000 in wage loss and immeasurable damage in the form of physical and emotional pain and suffering, which is ongoing. Nor does KPS disclose that Mr. Ohms and his wife Audrey almost lost their home in this ordeal and have ruined credit because KPS refused to pay the medical bills. The settlement did not make him anything close to “whole” and certainly does not constitute an excuse for KPS to avoid its promise.

For the reasons set forth in Mr. Ohms' opening brief, and herein, this Court should reverse the trial court and enter summary judgment in his favor on the contract claim and remand the extra-contractual claims for trial on the merits.

II. ARGUMENT

A. Exclusion 28 is Inapplicable to the Facts of this Case.

As noted in Plaintiffs' opening brief, Exclusion 28 only applies to an “occupational injury,” a phrase that modifies the entire exclusion.

The policy does not define “occupational injury.” The law requires that it be interpreted fairly, reasonably, and sensibly through the eyes of an average insurance purchaser. *Overton v. Consol. Ins. Co.*, 145 Wa.2d 417, 424, 38 P.3d 322, 325 (2002).

A fair, reasonable, and sensible interpretation of the phrase “occupational injury” is that it means an injury that occurs while working. Plaintiffs have been unable to find any authority holding that an injury that occurs while not working constitutes an “occupational injury.” Nor has KPS offered such authority. Accordingly, KPS has not satisfied its burden in opposing summary judgment.

Instead of addressing this problem, KPS ignores it and attempts to re-write the exclusion. KPS’ re-write is so broad that it now claims that Exclusion 28 “excludes coverage for any injury that is *connected in some way to*” one’s occupation. (KPS’ brief at p. 6) That is plainly not what the exclusion says. KPS’ argument ignores well-established law governing interpretation of insurance exclusions and, if accepted, would require this Court to liberally construe Exclusion 28 strictly against coverage.

The undisputed facts establish that Mr. Ohms did not sustain an “occupational injury” and Exclusion 28 is inapplicable.

Mr. Ohms is also entitled to summary judgment because his injuries did not “aris[e] out of, or in the course of” his work as a System Transport truck driver. When the accident occurred, Mr. Ohms was not engaging in an activity in the course of his employment as an independent contractor for System Transport. He was off duty, not being paid, and not working. Further, his vehicle was not capable of being used for work purposes.

Driving an unloaded truck 2,500 miles while off duty and uncompensated is not part of Mr. Ohms’ job. (CP 101) That is what he was doing when the Louisiana accident occurred. That he would have taken his truck over to Spokane to get fixed at some point after he made it home to Montana is not relevant to his status at the time of the accident. At that point, he was driving his personally-owned vehicle, completely free of the control or direction of his employer, System Transport. Mr. Ohms was not doing anything related to his employment at the time of the Louisiana accident. (CP 110) KPS

offers no more than speculation and argumentative assertions to dispute these facts.

The exclusion at issue also contains the phrase “in the course of” employment. KPS asks this Court to ignore this part of the exclusion too. Instead, KPS urges the Court to conclude that the phrase “arising out of” is the only important one. This is interesting because when it denied Mr. Ohms’ claim, the KPS adjuster did so because she concluded, erroneously, that Mr. Ohms was “driving a work related vehicle during the course *of doing his job as a truck driver.*” (CP 216)(emphasis added). Now that KPS knows that Mr. Ohms was not working, it claims that the phrase “in the course of” is not important.

KPS cites cases interpreting the phrase “arising out of” or “arising from” in completely dissimilar circumstances. None of the cases cited by KPS remotely involve an occupational injury exclusion. Moreover, an automobile accident that occurred while Mr. Ohms was driving his vehicle while “off duty” and as a result of the negligence of another motorist does not “flow from” his occupation. Thus, the cases cited by KPS, even if applicable, really do not support its position.

Mr. Ohms was not “on duty” or being paid and was free to do whatever he wished. System Transport had absolutely no control over him when the accident occurred. He was merely driving his personally-owned vehicle that he could have driven wherever he chose. On these undisputed facts, the occupational injury exclusion does not apply.

KPS desperately tries to come up with “facts” to show that the exclusion should apply. When analyzed, these “facts” are no more than speculation or false assumptions resulting from an inadequate investigation. For example, KPS argues that because System Transport informed it that there was no other insurance, including workers’ compensation coverage, it assumed that the accident was within the course and scope of Mr. Ohms’ employment. Had KPS bothered to investigate by contacting System Transport, it would have learned that this assumption was false. In his deposition, System Transport manager Dennis Williams unequivocally testified that the Louisiana accident was not related to Mr. Ohms’ work because he was “off duty.” (CP 110)

Based on the undisputed facts, Mr. Ohms did not sustain an

“occupational injury” because he was “off duty” and not working at the time of the accident. For the same reasons, Mr. Ohms’ activity – driving his personally-owned vehicle while “off duty” – did not “aris[e] out of, or in the course of” his work as a System Transport truck driver. Exclusion No. 28, which must be strictly construed against the insurer, does not apply on its face and the Court should grant partial summary judgment on the contract claim in the Ohms’ favor.

B. This is Not a Workers’ Compensation Case and Workers’ Compensation Cases do not Govern the Result.

In his opening brief, Mr. Ohms cited three workers’ compensation cases, only because they were cited within a non-workers’ compensation case, *McCarty v. King County Med. Serv. Corp.*, 26 Wa.2d 660, 175 P.2d 653 (1947). *McCarty* is on point because it involved a pre-paid medical plan that contained an occupational injury exclusion. The insured was injured when she fell down the elevator shaft of the building where she worked. The accident happened as she was showing up to go to work. In that case, the Washington Supreme Court held that the occupational injury

exclusion did not apply because the plaintiff was not yet working, but was preparatory to commencing her employment as an elevator operator. *Id.*, at 668.

Similarly, when involved in the Louisiana accident, Mr. Ohms was not working or being paid and was free of control or direction from his employer, System Transport. The fact that he was driving his truck that he sometimes uses for work is parallel to the employee in *McCarty* being injured in a building where she sometimes worked. The point being that just because an injury occurs in a location sometimes used for work does not automatically make it work-related. Whether the person was actually working is the key issue.

In response to citation of the workers' compensation cases discussed in *McCarty*, KPS provides a four-page analysis of the "going and coming" rule and the "traveling employee rule." *McCarty*, the workers' compensation cases cited by KPS, and Washington cases governing interpretation of exclusionary clauses in insurance policies establish that cases dealing with interpretation of workers' compensation laws and those dealing with interpretation of insurance

policy exclusions are apples and oranges.

They are apples and oranges because the underlying policies governing interpretation are so fundamentally different. A court considering a workers' compensation case must honor the following:

[T]he guiding principle in construing the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.

Cochran Electric Co. v. Mahoney, 129 Wn. App. 687, 692, 121 P.3d 747, 750 (2005). Thus, when a court is considering whether an employee like the one in *Ball-Foster Flass Container Co. v. Giovanelli*, 128 Wn. App. 846, 117 P.3d 365 (2005) was injured "in the course" of his or her employment (i.e., should receive benefits), it must liberally construe the situation in favor of coverage.

On the other hand, if the same situation in *Ball-Foster* presented in the context of an exclusion in a private insurance contract where the insurer was arguing that an occupational injury exclusion applied, the court would have to look at the situation through an entirely different lens. This was established right up-front by the Washington Supreme

Court in *McCarty*:

It appears that the contracts are prepared by the service corporation and are not read by the employees for whose benefit they are ostensibly drawn. In such situation, any ambiguity or doubtful language, under generally recognized rules of interpretation, must be resolved in favor of the employee.

McCarty, at 668. The lens through which the court looks at an insurance policy exclusion is even more exacting:

Certain basic principles apply when examining an exclusionary clause in insurance contracts. We first note that coverage exclusions are contrary to the fundamental purpose of insurance and will not be extended beyond their clear and unequivocal language. Exclusions, therefore, are strictly construed against the insurer.

City of Bremerton v. Harbor Ins. Co., 92 Wn.App. 17, 21, 963 P.2d 194, 196 (1998)(internal citations omitted).

Consequently, it would not be inconsistent for the same court that decided *Ball-Foster* to find an occupational injury exclusion in a private insurance contract, just like the one involved in this case, inapplicable to the employee in *Ball-Foster*. The analyses for a workers' compensation matter and a matter involving an exclusion in a private insurance policy are mutually exclusive.

Notwithstanding, *Ball-Foster*, upon which KPS relies heavily, is easily distinguished because the employee received *per diem* compensation even on days off. *Ball-Foster*, 128 Wn. App. at 852. Here, Mr. Ohms received no compensation whatsoever after he went “off duty” following the Florida accident. Had the claimant in *Ball-Foster* not received *per diem* on the day he was injured, he probably would not have received compensation even under the liberal construction requirement.

C. At Best, Exclusion No. 28 is Ambiguous and Must be Construed Strictly in Favor of Coverage.

If KPS wanted its policy to exclude coverage for “any injury connected in some way to one’s occupation,” as it now argues, it should have said so in plain and unambiguous language. It didn’t, because it would never be able to sell insurance with an exclusion like that. Under KPS’ expansive interpretation of Exclusion 28, insureds are not covered for any injury sustained when work takes them on the road, regardless of what they are doing when injured. Apparently, insureds on the road would not be covered if hurt at dinner, in a hotel room, on

a sightseeing tour, or any other activity. What is worse, if the exclusion means what KPS says, there is no way for an insured to know what activity is going to trigger the exclusion. A clever insurance adjuster could figure out a way to apply such an exclusion in most any situation.

Instead of writing an exclusion informing insureds that coverage is excluded for any injury “connected in some way” to your occupation, which no one would buy, KPS wrote a confusing and unclear exclusion that purports to apply only to an “occupational injury” and contains the phrase “in the course of” work. A reasonable insured is not going to read the exclusion and know to disregard these terms and understand that what the exclusion really means is any injury “connected in some way” to an occupation. A reasonable person is going to read the exclusion and conclude that it only applies to injuries that occur while working, which is consistent with the vast majority of occupational injury exclusions in health insurance policies.

An ambiguous exclusion must be given the meaning that favors coverage. Ambiguities are construed strictly against the insurer and with “added force” when it comes to exclusions. *City of Bremerton*, 92

Wn.App. at 20-21. An exclusion is ambiguous if, on its face, its language is fairly susceptible to two different, but reasonable, interpretations. *Id.* The whole exclusion, not bits and pieces, must be considered in determining whether ambiguity exists. *Farmers Ins. Co. of Washington v. Clure*, 41 Wn.App. 212, 215, 702 P.2d 1247, 1249 (1985).

Reading the entire exclusion, it only applies to an “occupational injury” that “arises out of, or in the course of” an activity pertaining to an occupation for wages or profit. KPS acknowledges that the exclusion contains the “course of employment” test, but argues that the *key* phrase in the exclusion is “arising out of.” How is a reasonable insured supposed to know that the “course of employment” test contained in the exclusion is not important, but the *key* phrase, “arising out of,” is? And if “arising out of” is the key phrase and subsumes “in the course of,” as it must, why does the exclusion include the “in the course of” test?

Read in its entirety, Exclusion 28 is anything but clear. Even the KPS adjuster handling this claim applied Exclusion 28 because she

concluded, erroneously, that Mr. Ohms' accident occurred "during the course of his job as a truck driver." (CP 216) If an insurance professional intimately familiar with this exclusion interprets it to apply to injury that occurs during the course of one's job, how does KPS expect a person who knows nothing about insurance to interpret it differently?

"When analyzing the policy and reviewing for an ambiguity, policy language is construed as if read by an average insurance purchaser." *City of Bremerton*, 92 Wn.App. 22, 963 P.2d 197. Without agreeing that KPS' interpretation of its exclusion is reasonable, there is no question that an average insurance purchaser could reasonably interpret it to only apply to injuries sustained while working. The fact that the exclusion is expressly limited to "occupational injuries" and contains the phrase "in the course of" work compels this conclusion. To agree with KPS, the Court would have to conclude that it would be *unreasonable* for an average insurance purchaser to give meaning to the phrases "occupational injury" and "in the course of." When KPS' own adjuster did not even interpret the exclusion as KPS is now suggesting,

this is more than a stretch.

If not inapplicable on its face, Exclusion No. 28 is, at best, ambiguous and must be interpreted in favor of coverage. Accordingly, the Court should reverse the trial court and enter partial summary judgment in the Ohms' favor.

D. Questions of Fact Preclude Summary Judgment on Plaintiffs' Bad Faith and Consumer Protection Claims.

KPS does not raise any new arguments in its brief on this issue. As set forth in the Ohms' opening brief, the extra-contractual claims involve questions of fact that must be decided by the jury, and are not properly disposed of on summary judgment. It is important for the Court to understand that KPS' current justification for its denial – that Mr. Ohms was injured on a “business trip” because he was driving his truck to Montana to get it repaired – was not advanced until after the litigation began.

The real reason that KPS denied coverage in the first place is that the adjuster erroneously believed that Mr. Ohms was injured “while driving a work related vehicle **during the course of** doing his

job as a truck driver." (CP 216) It was only after Mr. Ohms showed that he was not working that KPS began contending that whether he was working or not didn't matter. We submit that whether he was working at the time of the accident is of crucial importance and the undisputed fact that he was not, which KPS has known since March of 2005, establishes that Exclusion 28 does not apply.

KPS' continued reliance on the subrogation inquiry form (SIF) is disingenuous. While this might have served as an excuse for a short period of time, KPS has known since March of 2005 that Mr. Ohms was not working at the time of the accident. (CP 126, 128-129) KPS also tries to bolster its position because, it claims, Plaintiffs' counsel did not inform KPS before Mr. Ohms' deposition that circling "yes" on the SIF was a mistake. Had KPS conducted an investigation, or simply acknowledged the facts presented to it, it would have known this.

Plaintiffs' counsel provided KPS with a letter from System Transport dated March 16, 2005, informing KPS that Mr. Ohms was not working at the time of the accident. (CP 126) This was followed by an affidavit. (CP 128-129) While these documents might not say the

“magic words” KPS now says it needed to hear, it clearly conveyed the message that circling “yes” on the SIF was not correct. In addition, KPS now knows that circling “yes” on the SIF was a mistake and is still denying coverage. If the alleged failure to inform KPS that circling “yes” was a mistake is KPS’ rationale for denying coverage, it should not still be doing so.

KPS attempts to excuse its lack of investigation by claiming that investigation was not necessary because it was clear from the beginning that Mr. Ohms was “driving his commercial truck back home after delivering a load to Florida, and that the purpose of the trip was to get the vehicle repaired.” Without agreeing in any way that this argument means that Exclusion 28 would apply, this is not what KPS was thinking at all when it denied this claim. The adjuster’s own notes prove that she denied the claim because she concluded, mistakenly, that Mr. Ohms was working when the accident occurred. (CP 216)

As set forth in Plaintiffs’ opening brief, there are ample factual bases supporting Plaintiffs’ claims for bad faith and violation of the CPA and these claims must be decided by the trier of fact.

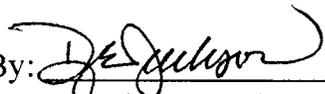
Accordingly, this Court should reverse the trial court and remand the extra-contractual claims for trial on the merits.

III. CONCLUSION

For the reasons stated above, the Court should reverse the trial court and enter summary judgment in the Ohms' favor on the breach of contract claim. The Court should remand the claims for bad faith and violation of the CPA for trial on the merits.

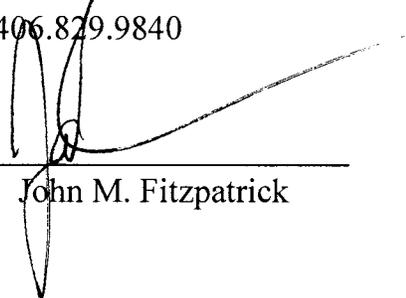
Dated this 18th day of August, 2006.

WILSON SMITH COCHRAN
DICKERSON
1700 Financial Center,
1215 Fourth Avenue
Seattle, WA 98161
Telephone: 206.623.4100
Fax: 206.623.9273

By: 

Dylan E. Jackson,
WSBA #29220

BUXBAUM, DAUE &
FITZPATRICK, PLLC
228 West Main, Suite A.
P.O. Box 8209
Missoula, MT 59807
Telephone: 406.327.8677
Fax: 406.829.9840

By: 

John M. Fitzpatrick

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 18th day of August, 2006, a true copy of the foregoing document was served by mail *and email* to the following individual(s) by depositing a copy of the same in the U.S. Mail, postage pre-paid thereon, addressed as follows, unless otherwise indicated below:

Bradley A. Maxa
Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, LLP
1201 Pacific Ave., Suite 2100
Tacoma, WA 98401



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