

Case No: 34494-7-II

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.

APPELLANTS' BRIEF

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

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STATE OF WASHINGTON
KITSAP COUNTY

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ORIGINAL

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I. NATURE OF THE CASE

This is a case involving coverage under a health insurance contract sold by KPS to Eddie Ohms. KPS has improperly applied an occupational injury exclusion to deny medical expenses arising out of an accident that occurred while Mr. Ohms was not working. On the undisputed facts, the exclusion does not apply. It is, at best, ambiguous and must be construed strictly in favor of coverage. The case also involves allegations of bad faith and Consumer Protection Act violations. These claims raise disputed factual issues that must be decided by a jury.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Plaintiffs' (Ohms') Motion for Partial Summary Judgment by Order dated February 11, 2006. (CP 17)

2. The trial court erred in granting Defendant's (KPS') Cross-Motion for Summary Judgment by Order dated February 11, 2006. (CP 17)

III. ISSUES PRESENTED

1. Does the occupational injury exclusion in KPS' policy apply to medical expenses arising from an injury sustained while the insured, Eddie Ohms, was not working? (Assignments of Error 1 and 2)

2. Alternatively, is the occupational injury exclusion in KPS' policy susceptible to more than one reasonable interpretation and, therefore, ambiguous? (Assignments of Error 1 and 2)

3. Do disputed issues of fact preclude summary judgment on Ohms' causes of action for bad faith and violation of the Consumer Protection Act? (Assignments of Error 1 and 2)

IV. STATEMENT OF THE CASE

This case involves the interpretation of a health insurance policy sold by KPS to Plaintiff Eddie Ohms. On October 28, 2004, Mr. Ohms was involved in a motor vehicle accident near Slidell, Louisiana. (CP 2, 6) As a result of the accident, Mr. Ohms sustained serious bodily injury, including a herniated cervical disk that required surgery. (CP 9, ¶ 11) As a consequence of the injuries sustained in the accident, Mr.

Ohms' medical expenses exceeded \$50,000. It is undisputed that, at the time of the accident, Mr. Ohms was "off duty," not carrying a load, not going to get a load, not being paid, not working, driving a personally-owned vehicle, and free to drive wherever he wished. (CP 9) Despite these undisputed facts, when Mr. Ohms submitted medical bills to KPS, it denied coverage based on an occupational injury exclusion in the policy. (CP 9, ¶ 9)

Mr. Ohms is a long-haul truck driver. (CP 6, ¶ 4) He owns his own truck and, although he lives in Montana, is employed as an independent contractor by System Transport, Inc., a Washington trucking company. (CP 9, ¶ 2, [Ex. 1, p. 4, 6]) In this arrangement, Mr. Ohms leases his truck exclusively to System Transport. (*Id.*, at p. 21-22) As part of the lease agreement with System Transport, Mr. Ohms is not permitted to work unless working for System Transport. *Id.*

In 2004, Mr. Ohms purchased health insurance from KPS to cover medical expenses in the event of an accident or illness. (CP 9, ¶ 5) It is undisputed that Mr. Ohms paid – and KPS accepted – all premiums when due and the policy at issue was in full force and effect

at the times relevant to this lawsuit. (CP 9, ¶ 12)

On October 21, 2004, Mr. Ohms was hauling a load to a destination in Florida when he was involved in a motor vehicle accident. (CP 2, 6) He was treated and released at North Florida Regional Medical Center in Gainesville, Florida. (*Id.*) Ohms was working at the time of this accident. (*Id.*) He was “on duty,” actively hauling a load, and being paid. (*Id.*) Health insurance benefits are not claimed for the medical expenses that were incurred in Florida and associated with this accident. (*Id.*)

Mr. Ohms’ truck and trailer were damaged in the Florida accident and, therefore, he was not capable of working. (CP 9, ¶ 2 [Ex. 1, p. 35]) Following the Florida accident, Ohms went “off duty.” (CP 9, ¶ 2, [Ex. 1, p. 8]) At this point, he was free to drive his personally-owned vehicle wherever he wished. (CP 9, ¶ 2, [Ex. 1, p. 24]) When “off duty” with System Transport, Ohms uses his truck as a personal vehicle and is free of any control by System Transport. He testified about this during his deposition:

Q. Are you allowed to drive your truck for personal

uses?

A. Yes. It's my truck.

Q. Okay.

A. I take my truck. My wife and I, we go to casinos, you know. And I got – my truck is all fancied out. I've got it all looking real pretty and all expensive equipment on it and everything. We've got TVs, a DVD, refrigerators, CBs, XM, you know. I've got all the comforts of home in my truck. We go camping. We go fishing. You know, we do a lot of things. We go shopping, you know, because my wife, she likes to ride in my truck because it's so nice. So, you know, it's my truck, and you know, nobody tells me what to do with it.

(Id. at p. 22)

After the doctor cleared Mr. Ohms to drive following the Florida accident, he decided to drive to his home in Montana. *(Id., at p. 35)* It is important to note that driving 2,500 miles “off duty” and without a load is not part of Ohms’ job. *(Id., at p. 19)* Had he not been in the Florida accident, Mr. Ohms would have picked up another load in Florida to take to Seattle and then would have taken a new load from Seattle to his “home base” for work in Spokane. *(Id.)* From there he would have gone “off duty” and driven to his home in Montana. *(Id.)*

On October 28, 2004, Mr. Ohms was passing through Louisiana on his way to Montana and was rear-ended by another tractor-trailer (hereafter “the Louisiana accident”). (CP 2, 6) At the time of the Louisiana accident, Mr. Ohms was not working. (CP 9, ¶ 3 [Ex. 2, pp. 8, 13]; CP 9, ¶ 2 [Ex. 1, p. 35]) He was “off duty,” was not carrying a load, was not under dispatch to get a load and was not being paid for driving or any other work in association with the trip. (CP 9, ¶ 3 [Ex. 2, p. 13]; CP 9, ¶ 2 [Ex. 1, p. 35]; CP 9, ¶ 6) Mr. Ohms was merely driving his personally-owned vehicle at the time of this accident. (*Id.*)

Mr. Ohms was seriously hurt in the Louisiana accident. He sustained a herniated disk in his neck that required surgery to remove the disk and fuse two vertebrae together. (CP 11) Mr. Ohms submitted medical expenses arising from this accident to KPS, which denied coverage based on one of 40 coverage exclusions. (CP 9, ¶ 9) Specifically, KPS denied coverage on the basis of Exclusion No. 28, which excludes coverage for:

Services for any occupational illness or injury arising out of, or in the course of, an activity pertaining to any trade,

business, employment (including self-employment) or occupation for wage or profit.

(*Id.*) According to the notes of KPS adjuster Donalee Austin, KPS concluded that the exclusion applied because the accident occurred “during the course of doing his job as a truck driver.” (CP 13, ¶ 5 [Ex. 2])

In fact, the accident did not occur during the course of Mr. Ohms’ job as a truck driver, but while he was not working and “off duty.” This is undisputed. KPS has admitted that at the time of the Louisiana accident, Mr. Ohms was not carrying a load, was not under dispatch to get a load, was not being paid, and was driving a personally-owned vehicle. (CP 9, ¶ 6) These admissions are supported by undisputed evidence. In a letter submitted to KPS, System Transport manager Dennis Williams established that Ohms was not working at the time of the Louisiana accident. (CP 9, ¶ 7) Mr. Williams’ letter was followed by an affidavit. (CP 9, ¶ 8) When KPS deposed Mr. Williams, he again confirmed that Ohms was not working and was “off duty” at the time of the Louisiana accident. (CP 9, ¶ 3 [Ex. 2, pp. 8, 13]) He further

testified that the Louisiana accident was not related to Ohms' work. (CP 9, ¶3 [Ex. 2, p. 13]) Faced with this undisputed evidence, KPS conceded at oral argument that Ohms was not working or on duty at the time of the accident. (TR, p. 28, ll. 2-7)¹

The only "evidence" that KPS relies on is a scrivener's mistake Mr. Ohms made in filling out a "Subrogation Inquiry Form" (SIF). KPS sent Mr. Ohms SIFs for both accidents. These forms do not track the language of the policy or warn insureds that KPS uses them to deny coverage. (CP 9, ¶ 4 [Ex. 3, pp. 36-37, 74]) The forms contain a question that asks, "Is this injury/condition job or work related?" and ask the insured to circle "yes" or "no." Mr. Ohms mistakenly circled "yes" on both forms. (CP 9, ¶ 10) He testified that circling "yes" was simply a mistake. (CP 9, ¶ 2,[Ex. 1, p. 43]) The undisputed evidence, including the letter from Mr. Williams, his affidavit, and the testimony of Williams and Ohms, establishes that Mr. Ohms was not working or on duty, that the accident was not work-related, and that circling "yes"

¹TR refers to the transcript of the hearing held on January 6, 2006. The Transcript is erroneously dated 2 June 1998.

on the SIF for the Louisiana accident was a mistake.

After the initial denial by KPS, Mr. Ohms appealed administratively and, after another denial, filed suit against KPS for breach of contract, bad faith, and violation of the Consumer Protection Act. (CP 2) After exchanging written discovery and taking depositions, Mr. Ohms moved for partial summary judgment on the breach of contract claim. (CP 8) KPS cross-moved for summary judgment on all claims. (CP 12) A hearing was held before the Honorable Leonard W. Costello on January 6, 2006. (CP 16; TR) The trial court denied Mr. Ohms' motion for partial summary judgment and granted KPS' cross-motion. (CP 17) Mr. Ohms timely appealed. (CP 18)

V. SUMMARY OF ARGUMENT

The exclusion at issue only applies to an “occupational injury” arising out of, or in the course of, an activity pertaining to work. It is undisputed that when Mr. Ohms was involved in the Louisiana accident he was not working and was “off duty.” Consequently, he did not sustain an “occupational injury” and his injuries did not arise out of, or in the course of, an activity pertaining to his work. Therefore, the

exclusion does not apply. This conclusion is supported by the terms of the exclusion and the following rules of insurance contract interpretation:

1. Coverage exclusions are contrary to the fundamental purpose of insurance and are strictly construed against the insurer. *City of Bremerton v. Harbor Ins. Co.*, 92 Wash.App. 17, 21, 963 P.2d 194, 196 (1998); and

2. The terms of an insurance policy must be given a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Overton v. Consol. Ins. Co.*, 145 Wash.2d 417, 424, 38 P.3d 322, 325 (2002)(citations omitted).

At best, the exclusion is ambiguous. Ambiguities in insurance policies are strictly construed against the insurer. *City of Bremerton*, 92 Wash.App. at 21, 963 P.2d at 196. This rule applies “with added force” to exclusions. *Id.* An exclusion is ambiguous if, on its face, its language is fairly susceptible to two different, but reasonable, interpretations. *Id.* Mr. Ohms’ interpretation of the exclusion – that it does not apply to an injury sustained while not working – is reasonable.

Before Mr. Ohms proved to KPS that he was not working, even KPS' own adjuster interpreted the exclusion to apply to an injury that occurs "during the course of doing [one's] job" (CP 13, ¶ 5, [Ex. 2 (bracketed material added)]) It was not until Mr. Ohms proved that he was not working that KPS changed its interpretation of its exclusion to the broad form it now argues.

Finally, questions of fact preclude summary adjudication of the Ohms' claims for bad faith and violation of the Washington Consumer Protection Act. Under Washington law, "an insurer has a duty of good faith to its policyholder and violation of that duty may give rise to a tort action for bad faith." *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 484, 78 P.3d 1274, 1276-77 (2003)(citation omitted). "Whether an insurer acted in bad faith is a question of fact." *Id.*, at 1277 (citation omitted). KPS has known since March of 2005 that Mr. Ohms was not working at the time of the accident. Notwithstanding, KPS has, to this day, refused to provide the coverage promised. KPS conducted no investigation and only learned facts obtained and provided by the Ohms' counsel. When asked about the inadequacy of the investigation, the KPS

adjuster handling the claim actually stated, “We do not investigate, you know, everything that we deny.” (CP 9, ¶ 4 [Ex. 3, p. 27]) There is ample evidence to support the Ohms’ causes of action for bad faith and violation of the Consumer Protection Act and those claims must be decided by a jury.

The trial court erred in denying the Ohms’ Motion for Partial Summary Judgment on the contract claim and erred in granting KPS’ Motion for Summary Judgment. Mr. Ohms respectfully requests that this Court 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.

VI. ARGUMENT

1. Standard of Review

The standard of review of an order of summary judgment is *de novo*. In *City of Bremerton*, this Court stated the standard as follows:

In reviewing an order of summary judgment, we engage in the same inquiry as the trial court. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The appellate court considers all facts

submitted and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.

City of Bremerton, 92 Wash.App. at 20-21, 963 P.2d at 196 (citations omitted).

The nonmoving party may not rely on speculation, argumentative assertions that fact issues remain, or having its affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wash.2d 1, 13, 721 P.2d 1, 7 (1986). After the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a genuine issue of material fact. *Id.* "The interpretation of an insurance policy is a question of law for the court." *City of Bremerton*, 92 Wash.App. at 21, 963 P.2d at 196 (citations omitted). This case involves interpretation of an insurance policy and, therefore, is appropriate for summary judgment.

2. Law Applicable to Interpretation of Insurance Contracts

Insurance policies are to be construed as contracts, and interpretation is a matter of law. *State Farm Gen. Ins. Co. v. Emerson*,

102 Wash.2d 477, 480, 687 P.2d 1139, 1141-42 (1984). “The terms of a policy should be given a ‘fair, reasonable , and sensible construction as would be given to the contract by the average person purchasing insurance.’” *Overton*, 145 Wash.2d at 424, 38 P.3d at 325 (quoting *Sears v. Grange Ins. Ass’n*, 111 Wash.2d 636, 638, 762 P.2d 1141(1988)). Special rules apply where, as here, an insurance company relies on an exclusionary clause:

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. *Stuart v. American States Ins. Co.*, 85 Wash.App. 321, 325-26, 932 P.2d 697 (1997), *aff’d*, 134 Wash.2d 814, 953 P.2d 462 (1998). Exclusions, therefore, are strictly construed against the insurer. *Stuart*, 85 Wash.App. at 326, 932 P.2d 697; *Findlay v. United Pac. Ins. Co.*, 129 Wash.2d 368, 374, 917 P.2d 116 (1996).”

City of Bremerton, 92 Wash.App. at 21, 963 P.2d at 196.

It is also well-settled under Washington law that “any ambiguities in the insurance policy are strictly construed against the insurer.” *Id.*; *see also State Farm*, 102 Wash.2d at 484, 687 P.2d at 1143-44 (“Where a clause in an insurance policy is ambiguous, it will be construed in a

manner most favorable to the insured regardless of the insurer's intention.”). “This rule applies with added force to exclusions limiting coverage.” *City of Bremerton*, 92 Wash.App. at 22, 963 P.2d at 196. An exclusion is ambiguous if, on its face, its language is fairly susceptible to two different, but reasonable, interpretations. *Id.* When analyzing the policy and reviewing for an ambiguity, policy language is construed as if read by an average insurance purchaser. *Id.*, 92 Wash. App. at 22, 963 P.2d at 197. The whole exclusion, not bits and pieces, must be considered in determining whether ambiguity exists. *Farmers Ins. Co. of Washington v. Clure*, 41 Wash.App. 212, 215, 702 P.2d 1247, 1249 (1985).

3. Eddie Ohms was not Working when the Louisiana Accident Occurred and, Therefore, KPS Wrongfully Denied Coverage

Mr. Ohms was not working at the time of the Louisiana accident and, therefore, Exclusion No. 28 is inapplicable. Exclusion No. 28 only applies to an “occupational illness or injury.” The Louisiana accident occurred on October 28, 2004. At the time of the accident, Mr. Ohms was off duty and had been since October 21, 2004. He was not working,

was not being paid, was not carrying a load, or going to get a load. He was merely driving his personally-owned vehicle which he could have driven wherever he chose. Setting aside the fact that the policy does not define "occupational illness or injury," only a tortured interpretation could lead one to the conclusion that an injury sustained while *not working* is an "occupational injury." Mr. Ohms did not sustain an "occupational injury," and Exclusion No. 28 is inapplicable.

Furthermore, the exclusion only applies to injuries "arising out of, or in the course of, an activity pertaining to any trade, business, employment (including self-employment) or occupation for wage or profit." 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 *not working*. Surely KPS is not suggesting that, simply because Mr. Ohms was in a truck that he *sometimes* uses for work, he should have to personally incur over \$50,000 in medical expenses for which he thought he was purchasing coverage. If so, KPS is trying to stretch this exclusion far beyond reality and strictly in its own favor. Such a self-serving interpretation flies in the face of Washington

law. *City of Bremerton*, 92 Wash.App. at 21, 963 P.2d at 196 (exclusions are strictly construed against the insurer.) The fact that Mr. Ohms decided to drive to Montana after the Florida accident does not change anything. He was just as “off duty” as he would be if he is taking his truck on a camping trip.

Washington law also compels this conclusion. *McCarty v. King County Med. Serv. Corp.*, 26 Wash.2d 660, 175 P.2d 653 (1947). *McCarty* involved a pre-paid medical plan that excluded coverage for injuries “sustained while in the course of employment.” *Id.*, 26 Wash.2d at 668, 175 P.2d at 657. The plaintiff worked for the Seattle Chamber of Commerce as an elevator operator. When she arrived at the building one morning and was getting on the elevator to go to the third floor employees’ room, she fell down the elevator shaft and was injured. The insurer denied coverage for medical expenses based on the occupational injury exclusion. The insurer argued that because the plaintiff was on her employer’s premises and preparing to start working, she was acting within the course of her employment. The defendant’s argument in *McCarty* is nearly identical to KPS’ argument – that because Mr. Ohms

uses his truck for work, an injury sustained while driving the truck must be work-related.

The Washington Supreme Court summarily rejected this simplistic approach. In its analysis, the Court relied on three Washington workers' compensation cases: *D'Amico v. Conguista*, 24 Wash.2d 674, 167 P.2d 157 (1946), *Purinton v. Department of Lab. and Indus.*, 25 Wash.2d 364, 170 P.2d 656 (1946), and *Mutti v. Boeing Aircraft Co.*, 25 Wash.2d 871, 172 P.2d 249 (1946). In *D'Amico*, the Court held that a utility worker who was killed by a detached wheel while he was on the work-site, but during a lunch break when he "was a free agent to go where and do whatever he might wish without consulting his employer," was not injured in the course and scope of his employment. In *Purinton*, the Court held that an employee who was injured while walking to work from a parking lot furnished by his employer 10 minutes before he was due to work was not injured in the course of his employment because he was not in actual performance of duties required by contract of employment. In *Mutti*, the Court held that an employee who was injured in the building where he worked while on

a lunch break was not injured within the course and scope of his employment because he was free to do whatever he wanted during lunch and was not being paid.

In all of these cases, the fact that the plaintiff was not being paid and was free to do whatever he wanted at the time of the accident was central. Here, Mr. Ohms' accident is even further removed from his employment. He is an independent contractor and owns his own truck. By contract, he works only for System Transport. This is not a situation where he uses his truck for work outside of his contract with System Transport. Mr. Ohms is only working when he is "on duty." He is only "on duty" when carrying a load or going to get a load for System Transport. When he is "off duty," as he was at the time of the Louisiana accident, he is not working and is free to do whatever he wants. While off duty, Mr. Ohms is not paid and System Transport has *absolutely* no control over him or his truck. These facts are undisputed and compel the conclusion that the occupational injury exclusion does not apply.

The cases cited above also undermine the central argument KPS made to the trial court – that the only reason for this dispute is that Mr.

Ohms “decided not to purchase workers compensation insurance.” (TR, p. 10, l. 23 - p. 11, l. 10) Assuming that Mr. Ohms could have purchased workers’ compensation coverage, it would clearly not have applied because he was not within the course and scope of his employment when the Louisiana accident occurred. This case has nothing to do with lack of workers’ compensation coverage and everything to do with requiring an insurance company to honor its promise.

Based on the undisputed facts, the Court should find that Exclusion No. 28 does not apply and should grant partial summary judgment on the contract claim in the Ohms’ favor.

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

Ambiguities in insurance policies are strictly construed against the insurer. *City of Bremerton*, 92 Wash.App. at 21, 963 P.2d at 196. This rule applies “with added force” to exclusions. *Id.*, at 22. An exclusion is ambiguous if, on its face, its language is fairly susceptible to two different, but reasonable, interpretations. *Id.* When analyzing the policy and reviewing for an ambiguity, policy language is construed as

if read by an average insurance purchaser. *Id.* The whole exclusion, not bits and pieces, must be considered in determining whether ambiguity exists. *Farmers Ins.*, 41 Wash.App. at 215, 702 P.2d at 1249.

Read in its entirety, Exclusion No. 28 is anything but clear and is plainly susceptible to different interpretations. By its terms, the exclusion applies only to an "occupational injury" that "arises out of, or in the course of" an activity pertaining to an occupation for wages or profit. Initially, KPS interpreted its exclusion to apply to injury that occurs during the course of work: "These injuries appear to have happen [sic] while driving a work related vehicle **during the course of** doing his job as a truck driver." (CP 13, ¶ 5 [Ex. 2]) When Mr. Ohms proved that he wasn't working, KPS came up with a new interpretation. Now KPS says that its exclusion means any injury arising out of an activity pertaining in any way to one's occupation. (CP 12, p. 5, ll. 13-16) While we don't agree that this interpretation is reasonable, it is an interpretation. Another interpretation, which *is* reasonable, is that the exclusion does not apply to an injury sustained while not working.

This interpretation makes sense because the exclusion applies only to an “occupational . . . injury” and contains the phrase “in the course of.” If “occupational injury” and “in the course of” have no meaning, as KPS suggests, why are they in the exclusion in the first place? If “arising out of” is the key phrase, why does the exclusion contain the phrase “in the course of?” Wouldn’t any injury sustained “in the course of” already be excluded by the phrase “arising out of?” If the exclusion is supposed to mean any injury arising out of any activity pertaining in any way to one’s occupation, KPS could have and should have said so in clear and unambiguous language. By modifying the entire exclusion with the requirement that an injury be an “occupational injury,” it is absolutely reasonable to conclude that it only applies to an injury sustained while working. Similarly, the fact that the exclusion includes the phrase “in the course of” supports this interpretation. KPS’ interpretation of the exclusion renders the phrases “occupational injury” and “in the course of” meaningless.

“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 Wash.App. at 22, 963 P.2d at 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. To agree with KPS, the Court would have to conclude that it is *unreasonable* for an average insurance purchaser to give meaning to the phrases “occupational injury” and “in the course of.” That is a difficult conclusion to reach considering the language of the policy and the fact that KPS’ own adjuster did not interpret the exclusion as KPS now suggests.

KPS argues that the Court should consider only two phrases – “arising out of” and “pertaining to” – and find the entire exclusion unambiguous. KPS goes on to argue that, really, “arising out of” is the only important phrase and, because there are Washington cases that have held that the term “arising out of” is unambiguous, the entire exclusion is unambiguous. This is an illogical and misplaced argument because the entire exclusion must be considered. When one considers the entire exclusion through the lens not of an insurance adjuster or lawyer, but an

average insurance purchaser, it is anything but clear and can reasonably be interpreted to apply only to injuries sustained while working.

While not conceding that KPS' interpretation of its policy exclusion is reasonable, there is no doubt that Mr. Ohms' interpretation – that it does not apply to an injury sustained while not working – *is* reasonable. Consequently, Exclusion No. 28 is ambiguous and must be construed strictly in favor of coverage.

Where a provision of a policy of insurance is capable of two meanings, or is fairly susceptible of two constructions, the meaning and construction most favorable to the insured must be employed, even though the insurer may have intended otherwise. This rule applies with added force in the case of exceptions and limitations to a policy's coverage.

Greer v. Northwestern Natl. Ins. Co., 109 Wash.2d 191, 201, 743 P.2d 1244, 1249 (1987).

Accordingly, the Court should reverse the trial court and enter partial summary judgment in the Ohms' favor.

5. Questions of Fact Preclude Summary Judgment on the Ohms' Bad Faith and Consumer Protection Act Claims

“[A]n insurer has a duty of good faith to its policyholder and violation of that duty may give rise to a tort action for bad faith.” *Smith*

v. Safeco Ins. Co., 150 Wash.2d 478, 484, 78 P.3d 1274, 1276-77 (2003)(citation omitted). “Whether an insurer acted in bad faith is a question of fact.” *Id.* (citation omitted). In *Smith*, the Trial and Appellate Courts granted summary judgment to an insurance company based on the same sort of conclusory statements KPS makes. The Washington Supreme Court reversed, holding that the issue was one of fact.

Here, KPS simply makes the legal conclusion that it did not act in bad faith. If that was all that was required, no issues would ever go to trial. KPS has not made a factual showing that it is entitled to summary judgment on the Ohms’ bad faith and Consumer Protection Act claims. Thus, it is not entitled to summary judgment.

The only “fact” KPS cites is the mistake Mr. Ohms made in filling out the SIF. While this might have served as a good 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. Notwithstanding, KPS has, to this day, refused to provide the coverage promised. The fact of the matter is that KPS, without conducting any investigation, decided

to deny Mr. Ohms' claim the very first day it learned of it. (CP 9, ¶ 4 [Ex. 3, p. 26]) After that, the only way that KPS learned any facts was when they were obtained and provided by the Ohms' counsel. When asked about the inadequacy of the investigation, the KPS adjuster handling the claim explained that, "We do not investigate, you know, everything that we deny." (*Id.* at 27). Although shocking, this was not a mis-statement. Ms. Austin testified again in her deposition that, "We do not investigate all claims." (*Id.* at 36).

KPS' conduct has been unreasonable, frivolous, and unfounded. Since day one, KPS has put its own interests in saving a dollar first, and the well-being of its insured second. From the day she received the claim, Ms. Austin assumed that because Mr. Ohms was in his truck when the accident occurred he was working, but she never bothered to investigate whether her assumption was true. No one from KPS contacted anyone from System Transport to investigate Mr. Ohms' status at the time of the accident. In Mid-March of 2005, Ohms' counsel provided KPS with a letter from a manager at System Transport establishing that Mr. Ohms was not working at the time of the accident.

(CP 9, ¶ 7) KPS continued to deny. The letter was followed by an Affidavit. (CP 9, ¶ 8) KPS continued to deny. In July, KPS admitted in discovery that Mr. Ohms was not carrying a load, was not under dispatch to get a load, was not being paid, and was driving a personally-owned vehicle at the time of the accident. (CP 9, ¶ 6) KPS still denied. On August 26, 2005, KPS took the depositions of Mr. Ohms and System Transport manager, Dennis Williams. If there was still any doubt about whether Mr. Ohms' activity at the time of the accident was related to his job, it was resolved in these depositions. Notwithstanding, KPS continued to deny and, to this day, will not honor its obligation to its insured. KPS' conduct has not only been unreasonable, its been mean-spirited. KPS' continuing attempt to hide behind a form filled out in December of 2004 that it knows to be a mistake and completely inconsistent with the undisputed facts constitutes bad faith.

Summary judgment is only appropriate for an insurer "if reasonable minds could not differ that it's denial of coverage was based upon reasonable grounds." *Smith*, 150 Wash.2d at 486, 78 P.3d at 1277-78. Additionally,

[T]he existence of some theoretical reasonable basis for the insurer's conduct does not end the inquiry. The insured may present evidence that the insurer's alleged reasonable basis was not the actual basis for its action, or that other factors outweighed the alleged reasonable basis.

Id. The only "theoretical reasonable basis" cited by KPS is the SIF, which KPS knows was a mistake and is inconsistent with the undisputed facts. Thus, there is ample evidence that the reason KPS claims it denied coverage was not the actual reason and, even if it was, the overwhelming facts outweigh the alleged reasonable basis.

The Ohms' CPA claim is based on violation of RCW 48.30.010, WAC 284-30-310, and WAC 284-30-330. Under Washington law, a first party insured may bring an action under the CPA for such a violation. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wash.App. 323, 332, 2 P.3d 1029, 1034 (2000). "A single violation of any of the provisions under 284-30-330 constitutes a per se unfair or deceptive practice for purposes of a Consumer Protection Act violation." *Id.* It is the Ohms' contention that KPS has violated WAC 284-30-330(1), (3), (4), (6), (7), and (13). The undisputed facts amply support these violations and, at the least, present a question of fact that must be

decided by the jury.

VII. 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 10th day of May, 2006.

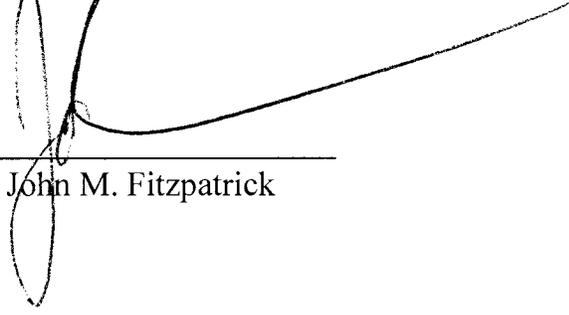
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 10th day of May, 2006, a true copy of the foregoing document was served by ~~mail~~ ^{ABC Legal messenger} 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:

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