

NO. 37256-8-II

Pierce County Cause No. 07-2-04911-3

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

KI SIN KIM,
individually,

Plaintiff/Respondent,

v.

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Defendant/Appellant.

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DIVISION II
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STATE OF WASHINGTON
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BRIEF OF APPELLANT ALLSTATE INSURANCE COMPANY

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. STATEMENT OF CASE 4

 A. Insurance Fraud in Washington.....4

 B. Background 4

 C. Kim’s Claimed Injuries 5

 D. Investigation into Kim’s Claim and
 Her Misrepresentations 6

 1. Employment , Ability to Work, and Wage Loss
 Claim 6

 2. False Statements Made During IME 9

 3. Physical Limitations from Accident.....11

IV. LEGAL ARGUMENT.....11

 A. Kim’s Intentional and Material Misrepresentations
 Void All Coverage 11

 1. Washington Law Regarding Insurance Policies.....11

 2. Kim’s Misrepresentations Were Material.....13

 3. Kim’s Misrepresentations Were Intentional.....16

 B. Kim’s Misrepresentations Preclude Any Finding of
 Bad Faith.....19

C. Allstate Did Not Violate the Consumer Protection Act.....21

1. Kim Cannot Establish The Elements of a CPA Claim 21

D. Allstate Did Not Violate the CPA Because the Investigation Was Reasonable.....23

V. Conclusion 26

TABLE OF CASES AND AUTHORITIES

Washington Cases

<i>American States v. Symes of Silverdale</i> , 150 Wn.2d 462, 78 P.3d 1266 (2003)	24
<i>Blake v. Federal Way Cycle</i> , 40 Wn. App. 302, 698 P.2d 578 (1985)	22
<i>Dombrosky v. Farmers Ins. Co.</i> , 84 Wn.App. 245, 928 P.2d 1127 (1996)	22, 24, 25
<i>Findlay v. United Pac. Ins.</i> , 129 Wn.2d 368, 278, 917 P.2d 116 (1996).....	12
<i>Hangman Ridge Training Stables v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986)	21, 22, 23
<i>Kay v. Occidental Life Ins. Co.</i> , 28 Wn.2d 300, 183 P.2d 181 (1947). . .	18
<i>Keith v. Allstate Indemn. Co.</i> , 105 Wn. App. 251, 19 P.3d 1077 (2001)	23
<i>Keyes v. Bollinger</i> , 31 Wn. App. 286, 640 P.2d 1077 (1982)	22
<i>Kitsap County v. Allstate Ins. Co.</i> , 136 Wn.2d 567, 575, 964 P.2d 1173 (1998).....	12
<i>Miller v. Indiana Ins. Co.</i> , 31 Wn. App. 475, 642 P.2d 769 (1982)	24, 25
<i>Music v. United Ins. Co.</i> , 59 Wn.2d 765, 769, 370 P.2d 603 (1962).....	16
<i>Mutual of Enumclaw v. Cox</i> , 110 Wn.2d 643, 757 P.2d 499	

(1988)	12, 13, 14, 20, 21
<i>Onyon v. Truck Ins. Exch.</i> , 859 F. Supp. 1338 (E.D. Wash., 1994)	12, 13, 14
<i>Overton v. Consol. Ins. Co.</i> , 145 Wn.2d 417, 38 P.3d 322 (2002)	24
<i>Pilgrim v. State Farm Fire & Cas. Co.</i> , 136 Wn.2d 214, 961 P.2d 358 (1997)	23,
<i>Sign-O-Lite Signs v. DeLaurenti Florists</i> , 64 Wn. App. 553, 825 P.2d 714 (1992)	21, 23
<i>Smith v. SAFECO Ins. Co.</i> , 150 Wn.2d 478, 78 P.2d 1274 (2003)	23, 24, 25
<i>State FarmGen. Ins. Co. V. Emerson</i> , 102 Wn.2d 447, 480, 687 P.2d 1139 (1984)	12
<i>St. Paul Mercury Ins. Co. v. Salovich</i> , 41 Wn.App. 652, 705 P.2d (1985)	13, 16
<i>Tornetta v. Allstate Ins. Co.</i> , 94 Wn.App. 803, 973 P.2d 8 (1999)	20, 21
<i>Transcontinental Ins. Co. v. Washington Public Utilities Dist.</i> , 111 Wn.2d 452, 760 P.2d 337 (1988)	24, 25
<i>Van de Grift v. Skagit County</i> , 59 Wn. App. 545, 800 P.2d 375 (1990)	21, 23
<i>Wickswat v. SAFECO Ins. Co.</i> , 78 Wn.App. 958, 904 P.2d 767 (1995)	13, 20, 21
<i>Wilburn v. Pioneer Mut. Life Ins. Co.</i> , 8 Wn. App. 616, 508 P.2d 632 (1973)	16

I. INTRODUCTION

This is a false insurance claim in which the insured, Ki Kim ("Kim"), intentionally misrepresented material facts to Allstate Insurance Company, ("Allstate"). Kim exaggerated her injuries and wage loss claim stemming from an automobile accident that occurred on July 1, 2005. Allstate discovered that Kim misrepresented her physical limitations and misrepresented her inability to work following the accident. It is undisputed that Kim misrepresented her injuries and wage loss claim as follows:

- Kim submitted a Wage and Salary Verification form signed by her employer on October 7, 2005, indicating she had not returned to work since July 1, 2005.
- Kim was observed working at Yoko Teriyaki on September 20 and 22, 2005, contrary to her wage and salary form.
- Kim was examined by Dr. Nicholes at an independent medical examination on October 10, 2005, where she claimed she was unable to work.
- Kim also claimed during the independent medical examination that she could not drive or stand for longer than one hour.
- On October 11, 2005, Kim was observed driving and walking without any physical limitations.
- Kim informed Allstate on October 26, 2005 that she had not returned to work at any time following the accident due to her injuries.
- Kim later informed Allstate on November 21, 2005 that she

had not returned to work at any time as of that date.

- During the arbitration on June 28, 2007, Kim testified that she did work at Yoko Teriyaki during the time she previously claimed she was unable to do so; however, she received no compensation for this work.
- Kim finally admitted in her deposition taken on September 19, 2007, that she did work at Yoko Teriyaki during September and October 2005 and was paid for this work.

Kim was given multiple opportunities to be honest with Allstate. However, it was not until she was presented with the surveillance evidence clearly showing her working and moving without limitations, that she changed her previous statements regarding her work history. Allstate denied Kim's claim for Personal Injury Protection ("PIP") and Uninsured Motorist ("UIM") coverage based on the policy provision stating that all coverage under the policy is void if an insured makes a material misrepresentation in submitting her claim.

In response, Kim filed suit against Allstate claiming breach of contract, bad faith and violations of the Consumer Protection Act ("CPA").

II. ASSIGNMENTS OF ERROR

Allstate assigns the following errors in the rulings made by the trial court.

1. The trial court erred in denying Allstate's Motion for Partial

Summary Judgment, entered on November 30, 2007, by the Honorable Vicki L. Hogan, wherein the trial court ruled that an issue of fact existed regarding whether Kim intentionally misrepresented a material fact regarding her insurance claim, thereby precluding coverage under the policy.

2. The trial court further erred by granting Kim's Cross-Motion for Summary Judgment, entered on December 14, 2007. Despite Judge Hogan's previous ruling that there were issues of fact regarding Kim's misrepresentations, Judge Hogan ruled, as a matter of law that Allstate violated the Consumer Protection Act without providing a legal basis for her ruling.

The trial court's rulings on Allstate's and Kim's cross-motions for summary judgment cannot be reconciled. It is obvious error that the Court found an issue of fact existed regarding whether Kim committed a misrepresentation, but then ruled as a matter of law that Allstate acted in bad faith and violated the CPA. These ruling are inconsistent with the law of Washington state dictating that an insured's intentional misrepresentations of material fact preclude coverage and a finding that the insurer acted in bad faith or violated the CPA.

This Court's inquiry need not extend beyond the analysis of Kim's misrepresentations. Because Kim intentionally misrepresented a material fact

regarding her claim to Allstate, the claims for violations of the CPA must automatically fail.

II. STATEMENT OF THE CASE

A. Insurance Fraud in Washington

Fraudulent insurance claims are a serious problem that have wide implications for consumers. The National Insurance Crime Bureau (NICB) estimates that fraudulent insurance claims costs the average household \$200-\$300 in higher insurance premiums *every year*. Based on studies involving the prevalence of insurance fraud, the NICB estimates that, at a minimum, an amount of 10% of property and/or casualty insurance claims are fraudulent claims. Please see Appendix

B. Background

On July 1, 2005, Kim was in a motor vehicle accident in which she was struck by an uninsured motorist. CP 15. Kim was insured by Allstate Insurance Company at the time of the accident. CP 15. Kim submitted a claim for damages pursuant to her PIP coverage as well as UIM coverage. CP 15. Included in these claims was a request for payment of medical expenses and lost wages. CP 15.

During the course of Allstate's investigation, it was discovered that Kim misrepresented material facts to Allstate regarding her claim. CP 17-22.

The policy contains a provision precluding coverage when an insured misrepresents or conceals any material fact to Allstate. CP 77. Specifically, the policy states as follows:

Fraud or Misrepresentation

The 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 77.

Allstate denied coverage for her PIP and UIM claims based on Kim's misrepresentations made regarding her injuries and wage loss claim. CP 117-119. Kim subsequently filed suit alleging breach of contract, bad faith and Consumer Protection Act causes of action. CP 1-4.

C. Kim's Claimed Injuries

Following her accident, Kim was seen at the emergency room. CP 161-168. Her examination at the hospital resulted in no objective finding of any injuries as all test results came back negative for injuries. CP 161-168. The tests Kim received included x-rays and CAT scans of her spine, legs and

abdomen. *Id.* The conclusion of all interpretive reports was that her only injuries were soft tissue in nature. *Id.*

D. Investigation into Kim's Claim and Her Misrepresentations

Allstate proceeded to investigate the claims based upon the minimal alleged subjective injuries and ongoing lost wage claim. This investigation included obtaining the recorded statement and examination under oath of Kim. CP 126 and CP 32. During both of these statements, Kim maintained that her injuries prevented her from returning to work. *Id.* In fact, she still claimed that she could not return to work at the time of her examination under oath on November 21, 2005. CP 32-33.

At every pertinent stage of the investigation, including her recorded statement, independent medical examination and examination under oath, Kim was represented by counsel and had an interpreter present.

Kim made the following undisputed misrepresentations regarding her claim:

1. Employment, Ability to Work, and Wage Loss Claim.

Kim was employed by Yoko Teriyaki at the time of the motor vehicle accident. CP 32. Kim claimed that she was unable to work from July 1, 2005, to at least her examination under oath of November 21, 2005. CP 104. However, Kim was observed and videotaped working on September 20, and

22, 2005. CP 46-54.

In her recorded statement taken on October 26, 2005, Kim stated that she had not returned to work because of her injuries:

Q: So since July 1, 2005 to today's date, which is October 26, 2005, you have not worked during this time period?

A: Yes.

Q: Why have you not returned to work?

A: Because I was in pain. My body was in pain.

CP 126.

In Kim's examination under oath, taken on November 21, 2005, Kim reiterated her alleged inability to return to work:

Q: When was the last time you worked?

A: July 1st.

Q: Of what year?

A: This year. I quit my last work on July 1st of this year.

Q: Did you quit voluntarily or did you quit because of this accident that happened on July 1st?

A: Because of the accident.

Q: Have you returned to work in any capacity since the day of the accident?

A: Not yet.

CP 32.

Prior to arbitration, Kim was presented with a copy of the video tape surveillance of her working. Again, Kim maintained at arbitration on June 28, 2007, that she did not work during the relevant time period despite this evidence:

Q: When was the first time you went to Yoko Teriyaki after the car accident of July 1, 2005?
A: I believe around September.
Q: Okay. And did you help out at all?
A: Yes, very briefly.
Q: Why did you go there to help out?
A: Because, you know, the owner's my friend. And then sometimes I went there to eat.
Q: Okay. Did you get paid for your services?
A: No.

CP 41-42

It was not until her deposition in 2007, two years later, that Kim finally told the truth that she was working for money during the relevant time period:

Q: Following the July 1st, 2005 accident, when was the first time that you returned to go inside Yoko Teriyaki?
A: I believe I went there for some business after I moved.
...
Q: And what do you mean that you went there for some business?
A: I believe I went there to see them and sometimes to help, to help them.
Q: And what do you mean by help them?
A: I went there briefly to work, to scoop the rice.
Q: Do you remember what month that was?
A: Maybe that's September of 2005.
...
Q: Did you receive any type of compensation for helping Yoko Teriyaki in September, 2005?
A: Yes, I received a little bit.
...
Q: Did you help Yoko Teriyaki at all in October of 2005, the next month?
A: I believe I helped a little bit, and then I stopped.
...

Q: Did you receive any financial compensation for the help you gave Yoko Teriyaki in October of 2005?

A: I received a little bit, but I don't know exactly how much.

CP 38-39.

It is undeniable and undisputed that Kim misrepresented her employment and injuries to Allstate. She falsely claimed she could not work when in fact she was working. She submitted a wage and salary verification form to recover lost wages that stated she did not work from July 1, 2005, to October 18, 2005. CP 104. She reiterated in her recorded statement on October 26, 2005 that she did not work. CP 126. She even claimed that she was unable to work at the time of her examination under oath one month later on November 21, 2005. CP 32. However, videotape evidence demonstrates that she did work during this time. CP 46-54. Most significantly, Kim ultimately admitted under oath during her deposition that she provided false information in support of her claim. CP 38-39.

2. False Statements Made During IME

Allstate requested Kim submit to an Independent Medical Examination, "IME", as part of its investigation into her claims. CP 105-116. The IME was performed by David Nicholes, D.C. Kim informed Dr. Nicholes that she was unable to return to work or perform household duties during the examination on October 10, 2005. CP 109. Kim also told Dr.

Nicholes that she was unable to drive due to her leg pain, and that she experienced continued neck pain, headaches, ankle swelling and dizziness. CP 109. However, as stated above, Kim was observed in September 2005 walking normally and working at Yoko Teriyaki. CP 46-54.

Dr. Nicholes observed Kim walking with a pronounced limp during the examination. CP 111. When Dr. Nicholes examined Kim's ankle, she pulled away in pain. CP 111. However, Dr. Nicholes again examined the same ankle and was able to press deeply without Kim pulling away or complaining of pain when Kim was distracted. CP 111. Dr. Nicholes noted that the ankle was not actually swollen as Kim claimed. CP 111. Further, the limp Kim exhibited was completely inconsistent with the type of gait that would ordinarily be present with an ankle injury. CP 111.

As part of the examination, Dr. Nicholes had Kim perform a half sit up. CP 114. Kim was unable to complete the task and complained of extreme pain. *Id.* Dr. Nicholes noted that a short time prior to this portion of the examination, Kim quickly and agilely jumped off the examination table when her daughter told her an insect was on the table. *Id.* This jump off the table involved the same motion she claimed to be unable to complete. *Id.*

Dr. Nicholes concluded that all injuries were resolved prior to the examination. CP 115. Specifically, Dr. Nicholes made the following

conclusions:

- Kim “feigned her physical injuries and presentation during examination. Her examination was characterized by pain behavior and pain in areas not being tested. Her presentation was inconsistent and inappropriate.” CP 115.
- Kim’s medical charts from her previous providers were altered to include additional symptoms that were not originally present following the accident. CP 114.

3. Physical Limitations from Accident

Finally, Kim also misrepresented her physical limitations due to her injuries. Initially, in her recorded statement, Kim stated that she was unable to stand for longer than one hour due to leg pain. CP 126. In her recorded statement on October 26, 2005, Kim stated that she was unable to walk for longer than 1 ½ hours at a time because of her left leg, knee, ankle and shoulder pain. CP 128. The surveillance report indicates that she was actually able to work a four-hour shift on her feet on September 20 and 22, 2005. CP 45-54. Kim was also observed walking and driving without any impediment or noticeable limitations on October 11, the day after the IME. CP 55-58.

III. LEGAL ARGUMENT

A. Kim’s Intentional and Material Misrepresentations Void All Coverage

1. Washington Law Regarding Insurance Policies

Interpretation of the language in an insurance policy is a question of law. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). An insurance policy is a contract and must be construed like any other contract. *Findlay v. United Pac. Ins.*, 129 Wn.2d 368, 278, 917 P.2d 116 (1996). The terms of the policy must be examined to give a plain meaning to all terms as they apply to coverage. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998).

In this case, the policy unambiguously states that all coverage is void if an insured intentionally misrepresents a material fact regarding her claim.

Specifically the policy states as follows:

Fraud or Misrepresentation

...

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 77.

Washington courts have repeatedly addressed the policy language at issue in this matter regarding misrepresentations made by insureds regarding their claims during an investigation into coverage. Courts have upheld the rule of law that there is no coverage available to an insured who (1) *intentionally* misrepresents or conceals, (2) a *material* fact regarding a claim. See *Onyon v. Truck Ins. Ex.*, 859 F. Supp. 1338 (W.D. Wash. 1994); *Mutual*

of Enumclaw Ins. Co v. Cox, 110 Wn.2d 643, 757 P.3d 499 (1988); *Wickswat v. Safeco Ins.*, 78 Wn. App. 958, 904 P.2d 767 (1995), *pet. for rev. denied*, 128 Wn.2d 1017 (1996); *St. Paul Mercury v. Salovich*, 41 Wn. App. 652, 705 P.2d 812, *pet. for rev. denied*, 104 Wn.2d 1029 (1985). An insured need only make one misrepresentation to void all coverage under the entire policy. *Onyon v. Truck Ins. Ex.*, 859 F. Supp. 1338, 1341 (W.D. Wash. 1994).

Specifically, the *Cox* case is analogous to the present situation. In *Cox*, the insured submitted a claim under two separate coverages in his policy, a personal property claim and a structural claim following a fire to his vacation home. *Mutual of Enumclaw v. Cox*, 100 Wn.2d 643, 645, 757 P.2d 499 (1988). In submitting his personal property claim, it was determined that *Cox* misrepresented the amount of property and individual items damaged in the fire. *Cox* at 648-649. As a result, the court concluded that the insurance policy provision precluding coverage when an insured misrepresents a material fact, voided all coverages, including both his structural and personal property claims. *Cox*, at 650. Similarly, Kim's misrepresentations regarding her injuries and her wage loss claim, voids all coverage under the policy.

2. Kim's Misrepresentations Were Material

A misrepresentation is material if it involves a fact that is relevant to

a claim or the investigation of a claim. *Onyon*, 859 F. Supp. at 1341. Materiality is determined from the standpoint of the insurer and not the insured. *Onyon*, 859 F. Supp. at 1342. Additionally, an insurer need not prove that it was prejudiced by an insured's misrepresentations. *Mutual of Enumclaw v. Cox*, 110 Wn.2d at 649; *Onyon*, 859 F. Supp. at 1341. An insurer need not have relied upon the misrepresentations or have been misled by the misrepresentation to void coverage on that basis. *Id.*

The misrepresentations made by Kim are undeniably material to the claim for coverage and Allstate's investigation into the loss because they involve the nature and extent of her injuries and wage loss claim. The following provides a summary of Kim's misrepresentations, but is not an exclusive list:

- **Employment at Yoko Teriyaki.** Kim submitted a Wage and Salary Verification form indicating she had not returned to work since the accident on July 1, 2005. CP 104. Plaintiff submitted multiple statements stating she had not worked. CP 126 and CP 32. Plaintiff was observed working. Plaintiff later admitted to working during the time she identified as unable. CP 38-39.
- **Injuries Claimed during IME.** Kim claimed that she was

experiencing multiple symptoms associated with her injuries from the accident during her IME taken on October 10, 2005. CP 109. However, there were no objective manifestations of any injury and Dr. Nicholes concluded that Kim was falsely displaying her injuries and all had resolved prior to her examination. CP 115.

- **Physical Limitations.** Kim also claimed in her recorded statements and examination under oath that she was unable to drive, or walk or stand without physical limitations. CP 126, 128 and 146. However, Kim was observed walking, driving and working with a normal range of motion and no limitations. CP 45-54. Kim was also observed driving and walking normally the day immediately following her IME where she complained of significant pain and physical limitations. CP 55-58.

The misrepresentations made by Kim go directly to the heart of her claim for coverage. Kim sought payment for her injuries and wage loss pursuant to her PIP and UIM coverages in the policy. She proceeded to misrepresent the extent of her injuries and her inability to work. The materiality of her misrepresentations is clear.

3. Kim's Misrepresentations Were Intentional

An insured's misrepresentations must also be intentional to void coverage. An insurer must prove, by a preponderance of the evidence that an insured's misrepresentation or concealment was intentional. *St. Paul Mercury v. Salovich*, 41 Wn. App. 652, 657, 705 P.2d 812, *pet. for rev. denied*, 104 Wn.2d 1029 (1985).

The intent to deceive is presumed, if the statement was made knowingly. *Music v. United Ins. Co.*, 59 Wn.2d 765, 769, 370 P.2d 603 (1962); *Wilburn v. Pioneer Mut. Life Ins. Co.*, 8 Wn. App. 616, 508 P.2d 632 (1973).

At all pertinent times during Allstate's investigation and this current litigation, Kim has been represented by counsel and had an interpreter present. This includes having an interpreter and attorney present during her recorded statements, examination under oath, arbitration hearing and deposition. At her IME, Kim had an interpreter and her daughter present; she was also represented by counsel at the time.

Kim reiterated her failure to return to work in two separate statements in 2005, her recorded statement and examination under oath. CP 126 and CP 32. Specifically, in her recorded statement, Kim was asked if she understood that Allstate could deny her claim if she misrepresented or concealed

information. CP 121. Kim responded that she understood. CP 121. At the outset of Kim's statements to Allstate, she knew if she misrepresented information regarding her claims, they would be denied.

These statements in her recorded statement and examination under oath completely contradict her statement during her deposition in 2007 that she actually did work during the time she claimed to be unable. CP 38-39. The dramatic change in her statement following the accident in 2005 to her deposition in 2007 is definitive evidence of the knowingly and intentional misrepresentations made by Kim regarding her employment.

Kim was given the opportunity during her deposition to explain the contradictory statements she previously made regarding her employment. However, there was no explanation given for her change in position two years after the accident. Specifically, Kim stated as follows:

Q: And on page 10 of the examination under oath at line 15 here's the question: Question, "Have you returned to work in any capacity since the day of the accident?" Answer, "Not yet." Do you see that? Is that a true answer?

Mr. Wilson: Objection, form.

A: I don't know.

Q: Is there any reason why when you were asked that question you didn't answer that you had worked for money in September and October?

Mr. Wilson: Objection, form.

A: I don't know.

CP 186.

Again, the intentional nature of these misrepresentations cannot be ignored. The obvious contradiction between her statements and actions in such a short proximity in time, provides overwhelming evidence that the misrepresentations were made knowingly.

The court in *Kay v. Occidental Life Ins. Co.*, 28 Wn.2d 300, 183 P.2d 181 (1947) stated the following regarding a showing of intent:

We have frequently held that a presumption is not evidence; and when we have said that the presumption must be overcome by evidence establishing an honest motive or an innocent intent...we meant only that the burden of going forward with the evidence is upon the assured or the beneficiary seeking to enforce the policy. The bare affirmation that there was no intent to deceive is not credible evidence of good faith, and, in absence of credible evidence of good faith, the presumption would warrant a dismissal.

Kay, 28 Wn.2d at 302 (internal citations omitted). Once an insurer has presented evidence of intent, there exists a presumption of intent for the insured to overcome. The court in *Kay* stated that the insured attempting to overcome a showing of intent by the insurer, must present actual evidence. Actual evidence does not include a bare statement that the insured did not intend to deceive. Plaintiff has not offered any factual evidence indicating

a lack of intent other than her bare assertions in a declaration. CP 169 - 170. These empty statements are clearly not adequate to fulfill Plaintiff's burden of bringing forth evidence indicating a lack of intent. As a result, there is a lack of credible evidence that Kim did not intend to deceive Allstate and a presumption that Kim intentionally misrepresented is established.

Kim's extensive material misrepresentations were presented above in detail. There is ample evidence that these misrepresentations were made intentionally and knowingly. Kim cannot present any evidence to overcome the presumption of intent because there simply is not any to present.

Because Kim's misrepresentations were both intentional and material, there is no coverage of any kind pursuant to the plain language of the policy. The misrepresentations void coverage for both the UIM and PIP claims. Therefore, this Court may properly rule as a matter of law that Kim intentionally misrepresented material facts regarding her claim to Allstate and therefore, all coverage is precluded.

B. Kim's Misrepresentations Preclude Any Finding of Bad Faith

As presented above, Kim misrepresented numerous facts regarding her claim for UIM and PIP coverage. Again, the Court need only find that Kim intentionally misrepresented material facts to Allstate and her CPA claims will also fail.

Washington courts have specifically stated that when an insured makes misrepresentations regarding a claim for insurance coverage, any claim by the insured for bad faith and CPA violations must fail. See *Mutual of Enumclaw v. Cox*, 100 Wn.2d 643, 652-53, 757 P.2d 499 (1988); *Wickswat v. Safeco Ins. Co.*, 78 Wn. App. 958, 970-71, 904 P.2d 767 (1995); *Tornetta v. Allstate Ins. Co.*, 94 Wn. App. 803, 973 P.2d 8 (1999).

The case of *Tornetta v. Allstate* is factually analogous. In *Tornetta*, the insured submitted a claim for coverage pursuant to his auto insurance and renter's insurance for a number of items were allegedly stolen and car damage when someone broke into his car. *Tornetta*, 94 Wn. App. 805-806. During the course of Allstate's investigation, it was determined that Tornetta misrepresented numerous facts regarding the claim. *Tornetta*, 94 Wn. App. 806-807. Tornetta misrepresented the facts surrounding the loss as well as the amount of property included in his claim. *Tornetta*, 94 Wn. App. 807. As a result, Allstate denied coverage pursuant to both his auto and renter's insurance claims that contained a provision identical to the one at issue in this case. *Tornetta*, 94 Wn. App. 807.

The main issue addressed by the Court of Appeals, was whether Tornetta could maintain his cause of actions for bad faith and CPA violations despite a finding that there was no coverage available due to his

misrepresentations. The Court held that in situations where coverage is precluded due to an insured's fraud, a cause of action for bad faith or CPA violations may not be pursued. *Tornetta*, 94 Wn. App. 810-811. See also, *Mutual of Enumclaw v. Cox*, 110 Wn. 2d 643, 652, 757 P.2d 499 (1988); *Wickswat v. Safeco Ins. Co.*, 78 Wn. App. 958, 970-71, 904 P.2d 767 (1995).

Because Kim misrepresented her injuries and wage loss claim, thus precluding coverage, there can be no finding that Allstate acted in bad faith or violated the CPA. Therefore, Kim's claims for violations of the CPA should be dismissed. If the Court finds that Kim misrepresented even one fact to Allstate, there is no need for further analysis regarding her CPA claims.

C. Allstate Did Not Violate the Consumer Protection Act

1. Kim Cannot Establish the Elements of a CPA Claim

To prove a Consumer Protection Act claim, Kim must prove the five elements set forth in *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). If a party fails to establish **all five** elements of the *Hangman Ridge* test, the court must dismiss the CPA claim. *Sign-O-Lite Signs v. DeLaurenti Florists*, 64 Wn. App. 553, 825 P.2d 714 (1992); *Van de Grift v. Skagit County*, 59 Wn. App. 545, 800 P.2d 375 (1990). The five *Hangman Ridge* elements that Kim must are:

1. An unfair or deceptive act or practice;
2. Occurring in trade or commerce;
3. That impacts the public interest;
4. Injury to her business or property; and
5. The injury was proximately caused by the unfair or deceptive act.

Hangman Ridge, 105 Wn.2d at 784-85.

Whether an act or practice is actionable under the Consumer Protection Act is a question of law. *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 260, 928 P.2d 1127 (1996), *rev. denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997); *Blake v. Federal Way Cycle*, 40 Wn. App. 302, 309, 698 P.2d 578 (1985); *Keyes v. Bollinger*, 31 Wn. App. 286, 640 P.2d 1077 (1982).

Kim has failed to present any objective evidence to support her claim that Allstate violated the CPA. There is no objective evidence that Allstate engaged in a deceptive act or practice. On the contrary, the only objective evidence of a deceptive act or practice has been Kim's misrepresentations regarding her claim. Further, Allstate has offered voluminous support for the reasonableness of the investigation into Kim's claims for coverage and the subsequent denial of both the PIP and UIM claims.

There is no objective evidence that any alleged unfair or deceptive act

or practice committed by Allstate impacted the public interest. Rather, Allstate's investigation and denial of this claim serves a definite public interest in uncovering and denying fraudulent insurance claims. See *Keith v. Allstate Indemn. Co.*, 105 Wn. App. 251, 256, 19 P.3d 1077 (2001); *Pilgrim v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 230, 961 P.2d 358 (1997).

Finally, Kim cannot provide evidence that she suffered any damage to business or property as a result of any part of Allstate's investigation. There have been no declarations from Kim or any other objective evidence indicating damages. Even if Kim could offer objective evidence to satisfy all other elements of the *Hangman Ridge* test, absent evidence of damage to business or property, the CPA claim must fail. See *Van de Grift v. Skagit County*, 59 Wn. App. 545, 800 P.2d 375 (1990); *Sign-O-Lite Signs v. DeLaurenti Florists*, 64 Wn. App. 553, 825 P.2d 214 (1992). Because Kim has presented no evidence of damage to any business or property, she cannot satisfy all elements of the CPA and the CPA claim must be dismissed.

D. Allstate Did Not Violate the CPA Because the Investigation was Reasonable

Kim alleges that Allstate acted in bad faith regarding the investigation into her claims. However, to establish the existence of bad faith, Kim is required to present evidence that Allstate's actions were unreasonable, frivolous, or unfounded. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.2d

1274 (2003); *American States v. Symes of Silverdale*, 150 Wn.2d 462, 78 P.3d 1266 (2003); *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002).

Reasonableness of an insurer's actions is a complete defense to any CPA claim by an insured. The insured has the burden of establishing that the insurer acted unreasonably, frivolously or unfoundedly. Specifically, the Washington Supreme Court in *Smith* stated as follows:

If the insured claims that the insurer denied coverage in bad faith, then the insured must come forward with evidence that the insurer acted unreasonably. The policyholder has the burden of proof. The insurer is entitled to summary judgment if reasonable minds could not differ that its denial of coverage was based upon reasonable grounds.

Smith v. Safeco Ins. Co., 150 Wn.2d at 486 (internal citations omitted).

Washington courts have repeatedly held that insurers do not act in bad faith or violate the CPA as long as there is a reasonable basis for their actions. See *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 928 P.2d 1127 (1996); *Miller v. Indiana Ins. Co.*, 31 Wn. App. 475, 479, 642 P.2d 769 (1982); *Transcontinental Ins. Co. v. Washington Public Utilities Dist.*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988). The court in *Smith* also stated the following regarding the reasonableness of an insurer's actions:

If the insurer can point to a reasonable basis for its action, this reasonable basis is significant evidence

that it did not act in bad faith and may even establish that reasonable minds could not differ that its denial of coverage was justified.

Smith v. Safeco, 150 Wn.2d at 486.

Kim bears the burden of establishing that Allstate's investigation and denial of her claim for PIP and UIM benefits was unreasonable, frivolous or unfounded. Absent such a showing, there can be no finding of a CPA violation. Kim has submitted no evidence that Allstate's actions amounted to a violation of the CPA.

The denial of benefits was based on Kim's misrepresentations. CP 117-119. The policy unambiguously states that any and all coverage is void if an insured misrepresents any fact regarding her claim for coverage. CP 77. Numerous Washington courts have held that a denial of benefits based on an insured's misrepresentations is reasonable and not bad faith or a violation of the CPA. See *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 928 P.2d 1127 (1996); *Miller v. Indiana Ins. Co.*, 31 Wn. App. 475, 479, 642 P.2d 769 (1982); *Transcontinental Ins. Co. v. Washington Public Utilities Dist.*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988). Kim's own actions were the basis of the denial. The reasonableness of Allstate's actions requires dismissal of Kim's CPA claim.

V. Conclusion

The trial court erred when it denied Allstate's motion for summary judgment regarding Kim's misrepresentations and found that an issue of fact remained. It is undisputed that Kim misrepresented the extent of her injuries and her wage loss claim. These misrepresentations were both intentional and material to the claims. The policy unambiguously states that all coverage is void if an insured misrepresents any facts regarding a claim. As a result, Allstate's denial of the PIP and UIM claims was proper. Therefore, this Court may rule as a matter of law that Kim's intentional and material misrepresentations preclude coverage.

Additionally, the trial court erred when it ruled on Kim's Cross-Motion for Summary Judgment that Allstate acted in bad faith and violated the CPA as a matter of law. The trial court erred in finding an issue of fact remained regarding Kim's misrepresentations but that Allstate acted in bad faith and violated the CPA as a matter of law. Allstate's investigation into and denial of Kim's PIP and UIM claims were reasonable, thus precluding any findings of bad faith or CPA violations. Regardless, Allstate did not act in bad faith or violate the CPA. Kim has offered no objective evidence to support either claim and cannot establish all five required elements of the

CPA. As a result, this Court may rule that Kim's bad faith and CPA claims are without merit and may be properly dismissed.

DATED this 3 day of July, 2008.

Respectfully Submitted,

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NO. 37256-8-II

Pierce County Cause No. 07-2-04911-3

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

KI SIN KIM,
individually,

Plaintiff/Respondent,

v.

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Defendant/Appellant.

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DIVISION II
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STATE OF WASHINGTON
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