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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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NO. 42542-4 II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CENTRAL PARK WEST, LLC,

Appellant,

v.

UNIGARD INSURANCE COMPANY,

Respondent

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**BRIEF OF RESPONDENT UNIGARD INSURANCE COMPANY**

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEFENDANT

ORIGINAL

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## I. INTRODUCTION

The trial court correctly granted summary judgment dismissing the claims asserted by Appellant Central Park West (“CPW”) against Respondent Unigard Insurance Company (“Unigard”). Unigard therefore respectfully submits that the trial court should be affirmed. In responding to Unigard’s motion, CPW was required to present admissible evidence to demonstrate the existence of a genuine issue of material fact. The trial court’s obligations in reviewing that evidence were clear:

- » The evidence and all reasonable inferences therefrom are to be considered in the light most favorable to the non-moving party. *E.g., Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). However, a court is not obligated to draw unreasonable inferences “that would contradict those raised by evidence of undisputed accuracy.” *Snohomish County v. Rugg*, 115 Wn. App. 218, 229, 62 P.3d 896 (2002).
- » When reasonable minds could reach but one conclusion based on the admissible facts in evidence, questions of fact may be determined as a matter of law. *E.g., Gausvik v. Abbey*, 126 Wn. App. 868, 879, 107 P.3d 98 (2005).

» Summary judgment is also properly granted when reasonable minds would find the non-moving party's evidence "too incredible to believe." *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

The trial court correctly granted summary judgment under the foregoing standards based upon the undisputed evidence and testimony of CPW's own principal, which established as a matter of law that CPW made misrepresentations to Unigard about the alleged theft of antique glass chandeliers. Contrary to CPW's suggestion, the court was not required to draw unreasonable inferences from CPW's evidence that contradicted other evidence of undisputed accuracy, nor was the court required to accept evidence that a reasonable juror would find to be "incredible." Thus, in granting summary judgment the trial court correctly applied Washington summary judgment standards and should be affirmed.

The trial court should also be affirmed because CPW has failed to meet its burden to prove the existence of the chandeliers that were allegedly stolen, and because the chandeliers could only have been covered under the policy's \$51,000 "business personal property" limits, which Unigard has already paid. *See, e.g., International Bhd. Of Elect. Workers v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000) (appellate court can affirm summary judgment on any basis

supported by the record); *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153 (2008) (same).

## **II. RESPONDENT'S COUNTER-STATEMENT OF ISSUES**

In response to CPW's Assignments of Error, Unigard respectfully submits that the issues presented in this appeal are as follows:

1. Under Washington law, is a trial judge required to deny summary judgment when the only possible inferences to support the plaintiff's claims are unreasonable and contradict other evidence of undisputed accuracy?
2. Should summary judgment be affirmed because CPW failed to meet its burden to establish the existence of the chandeliers?
3. Should summary judgment be affirmed because the chandeliers could only have been covered as "business personal property" and Unigard has already paid the full limits of that coverage?

## **III. STATEMENT OF THE CASE**

Unigard issued Policy No. BO 60 6396 to CPW for the coverage period from April 7, 2005 to April 7, 2006. **CP 020**. The policy provided coverage for two kinds of property relevant to this appeal. First, the policy covered loss of or damage to CPW's building, up to a limit of

\$661,800. **CP 024-25.** For purposes of this “building” coverage, the policy defined “covered property” to include “buildings and structures,” “[f]ixtures,” and “[m]aterials [and] supplies . . . used for making additions, alterations or repairs to the buildings or structures.” **CP 025.** Second, the policy provided coverage for personal property owned by CPW and used in its business, up to a limit of \$51,000. **CP 024-25.**

In addition, the policy contained an endorsement stating that the policy is void “in any case of fraud by you as it relates to this policy at any time.” **CP 053-54.** The policy is also void “if you or any other insured at any time, intentionally conceal or misrepresent a material fact concerning \* \* \* The Covered Property; [or] Your interest in the Covered Property; or . . . A claim under this policy.” **CP 053-54.**

CPW claims that numerous items were stolen from its building in Aberdeen, Washington in June 2005. In submitting CPW’s theft claim, CPW’s principal, Kenneth Mroczek, represented that the stolen items included a number of valuable antique chandeliers. **CP 060.** From July to December 2005, Unigard repeatedly asked Mroczek to provide a list of the stolen items and documentation to support their existence, but no documents were provided. *See* **CP 0062-71.** In February 2006, Mroczek provided a sworn proof of loss that included the following representation:

**FIXTURES:**

114 cartons containing two fixtures each of vintage / antique brass chandeliers valued at \$1,000.00 each that were fixtures for the building. 228 fixtures total.

**CP 073-76.**

Despite repeated requests from Unigard between April and July 2006, neither CPW nor Mroczek provided any documents or other information to substantiate the chandeliers' existence or CPW's ownership of them. *See CP 078-81.* Nonetheless, on August 3, 2006, Unigard informed CPW that the value of its loss appeared to exceed the policy's \$51,000 business coverage limit for personal property, and Unigard agreed to pay that amount upon receipt of a second executed proof of loss. **CP 083.** CPW did not respond, and Unigard subsequently sent a letter informing CPW that the file would be closed without payment. **CP 087.**

Unigard heard nothing further from CPW for almost two years until February 2008, when Mroczek requested two copies of CPW's insurance policy. **CP 089.** In April 2008, Mroczek informed Unigard that the value of his claim was now between \$1 million and \$2 million. **CP 092.** After Unigard reminded him the policy had a \$51,000 coverage limit for CPW's business personal property in the building, Mroczek asserted that he intended to install the chandeliers in the building as part of a plan to convert the building into an antique mall/museum. **CP 092.** Unigard

informed Mroczek that it needed additional time to investigate this new claim, but it nonetheless paid Mroczek the policy's \$51,000 personal property limit on May 6, 2008. **CP 095.** Unigard also reminded Mroczek that it still needed documentation to show the existence of the chandeliers and CPW's ownership, as well as evidence to substantiate his new claim that the chandeliers would be installed in a renovated building. **CP 097-98.** Unigard continued to hold the claim open, but CPW provided no further documentation to corroborate its claim.

Moreover, Unigard's investigation turned up numerous "red flags" indicating that CPW's theft claim was fraudulent. For example, Mroczek testified that he paid \$2,000 to purchase miscellaneous personal property from the Demanovich estate, including the chandeliers. **CP 116-117.** Mroczek testified that he found the chandeliers in a barn in Onalaska. **CP 112.** However, the executor of the Demanovich estate, Leonard Murr, unequivocally denied that his uncle's estate included any valuable antique chandeliers:

Q. What how big was that barn

A. Uh it was good sized barn you know the normal barn back in those days is what thirty feet by forty feet I mean it's a good size like a milking barn

\* \* \*

Q. And what was in the barn

A. Well just a bunch of uh surplus stuff um I mean there was nothing there of of value that I could see

Q. What do you mean surplus stuff was it

A. Well I think he had some I kind of want to remember some army surplus stuff and that and uh he had old uh World War II uh one of those convoy trucks you know that they had no top on it

\* \* \*

Q. [Did your uncle have] 114 cartons containing two fixtures of vintage antique brass chandeliers

A. No no no

Q. Are you certain

A. Oh yeah

**CP 142-144.**

In addition, as executor of his uncle's estate, Murr also filed a sworn Inventory of Assets identifying such things as individual shares of stock and two wrecked vehicles, but there is no mention of any antique chandeliers allegedly worth over a million dollars.<sup>1</sup> *See CP 128-38.*

Mroczek's own sworn testimony also indicated that the chandeliers never existed. For example, Mroczek testified that the 228 chandeliers

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<sup>1</sup> As executor, Murr was required to list the chandeliers on the estate inventory and obtain court approval before they could be sold on terms that would have removed from the estate assets with such an extraordinarily high value. *See* RCW 11.48.030 ("personal representative shall be chargeable in his or her accounts with the whole estate of the deceased which may come into his or her possession"); RCW 11.44.015 ("personal representative shall determine the fair net value, as of the date of the decedent's death, of each item contained in the inventory").

were in 114 boxes, that the 114 boxes were stacked up in the Onalaska barn, and that he only discovered them after “sifting through” the barn. **CP 113-115.** Mroczek also testified that each box was approximately 2-1/2 feet wide, 1-1/2 feet deep, and 2 feet high. **CP 119-120.** Taking Mroczek’s testimony as true, each box would have had a volume of about 7.5 cubic feet. Multiplying this by 114 boxes yields an approximate total volume of 32 cubic yards. According to Murr, the Demanovich estate’s executor, the Onalaska barn was approximately 30 x 40 feet, and it also contained a World War II convoy truck.<sup>1</sup> **See CP 142.** Plainly, the 114 large boxes described by Mroczek would have been readily visible in a barn that size, and the boxes and a large convoy truck would have taken up the majority of space in the barn.<sup>2</sup> The same would be true even if the barn was “roughly fifty or fifty-five feet in width by seventy-five to eight to eighty feet in length,” as CPW now argues. (*See App. Brief at p. 3.*) Despite the large quantity and volume of boxes described by Mroczek, however, Murr unequivocally states there were no such boxes or chandeliers in the barn. The Demanovich estate inventory likewise does

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<sup>1</sup> Documents of record in the Demanovich probate corroborate Murr’s estimate that the barn was approximately 30’ x 40’. **See CP 219, CP 222.**

<sup>2</sup> To illustrate, stacking the 114 boxes along a 40-foot barn wall would require a row 26 boxes long and four boxes (eight feet) high, if stacked along their 1-1/2 foot side. Stacking the boxes by their 2-1/2 foot side would require a row 16 boxes long and seven boxes (14 feet) high.

not mention any antique chandeliers worth up to \$2 million, even though it lists numerous items of substantially lesser value. *See CP 134-38.*

In response to Unigard's summary judgment motion Mroczek claimed, for the first time, that some of the boxes were in an upstairs loft in the barn. (*See App. Brief at 3-4.*) However, when previously asked where he found the chandeliers, Mroczek suggested that they were on the barn's main floor and did not mention any loft:

Q. . . . Were they in any particular corner of the barn, were they up against any particular wall, east, west?

A. Oh, I don't even know which way is east, west up there.

Q. Okay. Were they in plain site [sic]?

A. No, no not really. Like I say, there's a lot of papers and a lot of other – he basically didn't throw anything away[.]

\* \* \*

Q. Okay. Were the chandeliers hidden behind something?

A. Hidden?

Q. Hidden, out of view.

A. Well, yeah.

Q. Obstructed.

A. I didn't really notice them right off, you know, but as you kind of sifted through the place, you know.

**CP 114.** If the boxes were truly upstairs as Mroczek now claims, he would have said so two years ago when asked if the boxes were “hidden” or “out of view.”

Mroczek also testified that he inspected only a portion of the chandeliers and that he never had them appraised or inventoried:

Q. All right. And did you ever have an opportunity to inspect the chandeliers?

A. Yes, I looked at – not every single one of them, but quite a few of them.

Q. Okay. How many would you say you looked at?

A. Oh, I would say over half.

Q. Over half, okay. So would that be like 60%, 75%, 90%?

A. Well, I would say maybe 60%.

\* \* \*

Q. Okay. Did you ever have anybody look at them?

A. No.

Q. To give you an appraisal or anything?

A. No.

**CP 115-116, CP 118.**

Despite admitting that he knew little or nothing about the chandeliers or their value at the time of the theft, Mroczek submitted a sworn proof of loss to Unigard describing each of the 228 chandeliers in

detail: “80 each Quezal,”<sup>1</sup> “50 each Etched,” “10 each Etched/Deco,” and “88 each Acid Frosted Deco”. **CP 156-157**. And, even though Mroczek testified that he never had anyone else view the chandeliers or appraise them, **CP 118**, his sworn proof of loss states that the chandeliers were worth \$580,860.00.<sup>2</sup> **CP 157**

Mroczek also testified that he conveyed the chandeliers to CPW as a kind of “gift” or capital contribution. **CP 104-105**. However, even though he now claims the chandeliers were worth between \$500,000 and \$2 million, Mroczek never reported his “gift” to the IRS as a charitable contribution or for gift tax purposes. **CP 105**. And, CPW has never provided any company tax return showing this purported “capital contribution.”

Mroczek further testified that he intended to install the chandeliers as part of a renovation project to convert CPW’s building into an antique museum, but he also conceded he had done nothing to pursue that plan, such as obtaining permits, preparing plans or drawings, or retaining

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<sup>1</sup> The Quezal Art Glass Company was a manufacturer of Art Nouveau glass products that was in operation from 1902 to 1924. *See* [www.collectics.com/education\\_quezal.html](http://www.collectics.com/education_quezal.html).

<sup>2</sup> Mroczek allegedly came up with this number by visiting Bogart, Bremner & Bradley in Seattle, where he “obtained pictures and values of similar vintage chandeliers they had for sale.” **CP 193**. Conspicuously absent, however, is any written appraisal from Bogart, Bremner & Bradley substantiating the chandeliers’ existence, and Mroczek has testified that no one else ever saw the chandeliers. *See* **CP 118**.

contractors. **CP 106.** In fact, at the time of the alleged theft, CPW's building was not even connected to power. *See CP 107-108.* Although Mroczek now asserts that he had chandeliers moved to the building "by Oak Harbor Freight Lines" (*see* App. Brief at 4), there are no receipts, bills of lading or other documents that could support this claim. And, although Mroczek also claims he "discuss[ed] obtaining a loan for use in constructing the museum," (App. Brief at 5), CPW has never produced any documents to substantiate this assertion, such as a loan application or correspondence with a lender.

Simply put, other than Mroczek's self-serving representations, CPW has not produced one shred of competent, objective evidence to support its claim for the alleged theft of the chandeliers. Further, Unigard's investigation also indicated that Mroczek was misrepresenting the existence and/or value of the chandeliers. Accordingly, by order dated August 5, 2011, the trial court granted summary judgment for Unigard, finding that CPW and Mroczek had misrepresented the existence of the chandeliers and that CPW's theft claim was fraudulent. **CP 246-247.** In her oral ruling, the trial judge stated that Unigard had met its "very high burden" on summary judgment:

. . . Unigard argues to me that Central Park West made multiple misrepresentations, and they are evidence as to the differences in the sworn testimony in terms of loss. . . . Differences in a

very detailed list, and then when the sworn deposition is taken, I only opened 60.

The question then becomes that the inventory of the estate includes junk cars, some very miniscule personal property. And yet, if believed, these chandeliers are worth between \$500,000 and \$2 million. The testimony of the executor for this estate says,

“Did your uncle have 114 cartons containing each two vintage glass chandeliers?”

The answers are, “no,” “no,” “no.” . . . We don't have pictures. We don't have anything. And I find it to be incredible. You cannot pay \$2,000 of chandeliers and have them worth \$500,000 to \$2 million. The burden is completely high, and I think Unigard has met its burden.

. . . To me, there is also a misrepresentation in - - if you look at these boxes, and I did - - I'm not a math major. But 1,200 square feet of this barn, 9,600 cubic feet of boxes were there, along with a World War II convoy truck in this. These boxes would have been seen. 114 boxes in 1,200 square foot with a convoy truck? . . . But surely those boxes would have been seen. There's just no doubt in the court's mind. It's not just a he said/ she said.

. . . I believe there was an intentional misrepresentation of material fact that they ever existed. . . . But I believe that the math, along with the depositions, along with the deposition of your client, along with the estate inventory, is sufficient. They just didn't exist.

**RP at 17:7-19:4 (emphasis added).**

This appeal followed.

#### IV. ARGUMENT

The trial court should be affirmed because – contrary to CPW's assertions – the court did not weigh the evidence or usurp the role of the

trier of fact. Rather, the court correctly applied Washington summary judgment standards, it properly declined to draw inferences that were unreasonable and that contradicted other undisputed evidence, and it correctly concluded that CPW's evidence was too incredible for a reasonable juror to believe.

The trial court should also be affirmed because CPW failed to present any competent evidence to support the existence and ownership of the chandeliers, and also because the chandeliers could only have been covered as business personal property, and Unigard has already paid the full limits of that coverage.

**A. Standard of Review.**

A trial court's grant of summary judgment is reviewed *de novo*, with the appellate court engaging in the same inquiry as the trial court. *E.g., Gausvik v. Abbey*, 126 Wn. App. 868, 879, 107 P.3d 98 (2005). Because review is *de novo*, the appellate court may affirm a grant of summary judgment on any basis that is supported by the record. *See, e.g., International Bhd. Of Elect. Workers v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000); *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153 (2008).

**B. The Trial Court Properly Applied Washington Summary Judgment Rules In Making Its Ruling, And CPW's Manifest Misrepresentations Void Any Coverage Under The Policy.**

**1. The Trial Court Was Not Obligated To Apply Unreasonable Inferences Or Accept Testimony That Was Manifestly Incredible.**

Washington law is clear: In evaluating a summary judgment motion, the trial court is to construe the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *See, e.g., Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). It is equally clear that the trial court is not required to draw unreasonable inferences “that would contradict those raised by evidence of undisputed accuracy.” *Snohomish County v. Rugg*, 115 Wn. App. 218, 229, 62 P.3d 896 (2002). *See also Schmerer v. Darcy*, 80 Wn. App. 499, 509, 910 P.2d 498 (1996) (affirming summary judgment because, *inter alia*, it was unreasonable to infer that undisputed letters between parties indicated collusion or intention to interfere in business relationship); *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 45, 747 P.2d 1124 (1987) (affirming summary judgment for school because it was unreasonable to infer in light of other undisputed facts that relationship between teacher and student was connected to school activities).

When reasonable minds could reach but one conclusion based on the admissible facts in evidence, the trial court on summary judgment may

determine questions of fact as a matter of law. *E.g.*, *Gausvik v. Abbey*, 126 Wn. App. 868, 879, 107 P.3d 98 (2005). Summary judgment is also appropriate when reasonable minds would find the non-moving party's evidence "too incredible to believe." *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

*Snohomish County v. Rugg, supra*, is instructive. The Ruggs owned residentially-zoned property in Snohomish County, and they were cited by the County for illegally storing their construction company's vehicles on the property. When the Ruggs failed to comply with the County's compliance orders, the County sued them to enforce the zoning code. The County moved for summary judgment based on affidavits of its code-enforcement officers and several neighbors, who had maintained detailed logs documenting the activities on the Ruggs' property. *Rugg*, 115 Wn. App. at 222-23.

The Ruggs responded to the County's summary judgment motion by submitting, *inter alia*, affidavits from their family members and employees of their construction company stating that their visits to the property were for personal and recreational activities, which were allowed under the residential zoning. *Id.* at 223. However, the Ruggs did not contest the accuracy of the logs kept by their neighbors and, although they

denied that they based their construction business on the property, the Ruggs failed to identify where their business was actually based. *Id.*

The trial court granted summary judgment for the County stating that, “[T]here’s only one result you could reach from this.” *Id.* at 223-24.

The Court of Appeals affirmed:

. . . [S]ome of the commercial activity reflected in the neighbors’ logs and declarations was clearly legitimate. But the neighbors’ logs document far more commercial activity than can reasonably be accounted for by the permitted work. Reasonable minds can reach but one conclusion: The Ruggs were basing their commercial business operations on the property, running their business from there, and keeping heavy commercial vehicles on the property overnight and taking them out the next day[.] And it is beyond dispute that if they had not been basing their business operation on the property, they would have promptly stated in their very first declarations that their business was based at another specific location, and they would have given that address so that their representations could be verified. . . . The failure of the Ruggs to state on the record where their business was based, if not on this property, is such a glaring omission of dispositive evidentiary fact that a trial of fact could reach only the same conclusion as that reached by the trial court: [the construction company] was being operated out of the Ruggs’ property in rural Snohomish County that is the subject of the enforcement action. Summary judgment in favor of the county was proper.

\* \* \*

In sum, there is a difference between weighing evidence and credibility—which are functions for a trier of fact and not for the trial or appellate court on summary judgment—and (1) observing that the credibility of the neighbors’ logs is unchallenged, (2) observing that the Ruggs’ declarations about the work done on their property cannot possibly explain the sheer volume and type of activity described by the neighbors, even after drawing all reasonable inferences in favor of the

nonmoving party, and (3) observing that the Ruggs failed to provide the single evidentiary fact that only they and their employees could provide—where they were basing their construction business if not on this property. All reasonable inferences must be drawn in favor of the nonmoving party upon summary judgment. Unreasonable inferences that would contradict those raised by evidence of undisputed accuracy need not be so drawn.

*Id.* at 227-29 (italics in original; underlining added).

Contrary to CPW’s arguments, the trial court in this case fully complied with the legal standards for granting summary judgment. First, the trial court observed that the sworn inventory filed by the executor of the Demanovich estate listed “junk cars [and] some very miniscule personal property” but, significantly, the inventory did not list any antique chandeliers allegedly worth between \$500,000 and \$2 million; this was consistent with the executor’s unequivocal statements that his uncle’s estate contained no such chandeliers. **RP at 17:15-22.** The court also observed that “[w]e don’t have pictures [and we] don’t have anything” to substantiate CPW’s claim for the chandeliers. **RP at 18:2-3.** Thus, the trial judge correctly acknowledged the undisputed accuracy of the Demanovich probate documents, and she also observed the glaring omission of any objective evidentiary fact to support CPW’s claim that the chandeliers ever existed. Based on this and other evidence presented with Unigard’s motion, the trial judge properly declined CPW’s invitation to

draw any inferences that would have been unreasonable and that contradicted the other “evidence of undisputed accuracy” in the record. *Cf. Rugg supra*, 115 Wn. App. at 229.

The court also found it “to be incredible” – even in light of the “completely high” burden on summary judgment – that Mroczek purported to have paid \$2,000 for chandeliers that were now claimed to be “worth \$500,000 to \$2 million.” **RP at 18:3-6.** *Cf. Balise v. Underwood, supra*, 62 Wn.2d at 200 (summary judgment is properly granted when reasonable minds would find the evidence “too incredible to believe”). The trial judge further noted that based on Mroczek’s sworn testimony regarding the size of each of the 114 boxes, a reasonable juror could only conclude either that the chandeliers were either not in the Onalaska barn, or that they would not have been overlooked by the estate had they been there. *Cf. Gausvik v. Abbey, supra*, 126 Wn. App. at 879 (trial court can determine questions of fact as a matter of law when reasonable minds could reach but one conclusion based on the admissible facts in evidence).

Based on this evidence, the trial court correctly concluded “that the math, along with the depositions, along with the deposition of [Mroczek], along with the estate inventory” were sufficient to establish, as a matter of law, that CPW materially misrepresented the chandeliers’ existence to Unigard. **RP 18:21-19:4.** In so ruling, the trial court did not weigh the

evidence or rule on credibility; it properly declined to draw unreasonable inferences that were contrary to other evidence of undisputed accuracy, and it also properly declined to accept unsupported averments that a reasonable juror would find to be “incredible.” The trial court’s ruling thus fully comports with Washington summary judgment standards and should be affirmed.

**2. CPW’s Misrepresentations To Unigard Void Any Coverage Under The Policy.**

Unigard’s policy expressly states that the policy is void if CPW or any other insured intentionally conceals or misrepresents a material fact concerning the “Covered Property” or a claim under the policy. **CP 53-54.** These anti-fraud provisions are valid and enforceable. *See Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988). In *Cox*, Mutual of Enumclaw (“MOE”) issued a homeowners policy to Cox that had a limit of \$137,000 for unscheduled personal property. After a fire destroyed his house and its contents, Cox submitted an insurance claim representing that the value of his lost personal property was \$324,420. However, MOE’s investigation of the burned house turned up no evidence of certain items claimed lost, valued at \$35,000 to \$40,000, including jewelry and eight bronze sculptures. Under oath, Cox denied making

misrepresentations in his claim, but admitted making numerous mistakes on the inventory list.

Based on its investigation, MOE sued for a declaration that Cox's loss was not covered. The trial court granted summary judgment for MOE, concluding that Cox made one or more misrepresentations in presenting his claim. The Washington Supreme Court accepted direct review and affirmed:

There is ample evidence from the trial record that Cox committed fraud by including numerous items on his inventory list which were not at his Clear Lake house when the fire occurred. Some of these items claimed lost, such as jewelry and the bronze sculptures, should have been found during the sifting [of debris from the house]. Cox attempted to defraud MOE.

*Id.* at 648. The court further ruled that Cox's misrepresentations voided the MOE policy, even though MOE bore no risk of additional loss resulting from the misrepresented items because the actual lost property far exceeded Cox's personal property limits. *Id.* The court noted, *inter alia*, that "[i]nsurance companies rely on insureds honestly filling out inventory lists of destroyed property. Dishonesty by insureds cannot be ignored." *Id.* at 649. Under *Cox*, any fraud in presenting a claim is material and voids all coverage, even if there are other items would have been covered in the absence of fraud.

In order to void coverage based upon fraud in submitting a claim, the insurer must only show that the insured made a misrepresentation by a “preponderance” of the evidence. *St. Paul Mercury Ins. Co. v. Salovich*, 41 Wn. App. 652, 658-59, 705 P.2d 812 (1985). Moreover, “an insurer need not establish that it relied to its prejudice upon the false statements in the claim for coverage in order to establish a breach of the contract and void the policy.” *Id.* The insurer need only prove that the insured made some misrepresentation in presenting the claim. *Id.*

As stated above, the evidence before the trial court – including the undisputed Demanovich probate documents and Mroczek’s own sworn testimony – establish as a matter of law that CPW misrepresented one or more facts in presenting its theft claim to Unigard. Under very similar facts, the Washington Supreme Court in *Cox, supra*, found insurance fraud as a matter of law where the insured claimed the loss of several valuable items in a house fire, but the insurer found no evidence to corroborate the claim and its investigation, instead, indicated that the items were not even in the house at the time of the fire.

Even assuming, *arguendo*, that some chandeliers could have existed (which they did not), Mroczek’s own testimony demonstrates fraud in yet another respect. Mroczek testified that he only inspected “maybe 60%” of the chandeliers. **See CP 115-116.** Mroczek’s

declaration also states that he opened up all 114 boxes but “only opened about 60% of the [two] cartons contained in each box.” **CP 191**. Even assuming this to be true, Mroczek admittedly did not personally inspect each of the chandeliers to determine, *inter alia*, whether each carton actually contained a chandelier, what kind of chandelier was in each carton (*e.g.*, Quezal or some other make), whether any chandeliers were broken or damaged, or whether they were extraordinarily valuable antiques as CPW now contends.

Despite examining only a portion of the chandeliers, however, Mroczek submitted a sworn proof of loss expressly representing to Unigard that the cartons contained “80 each Quezal,” “50 each Etched,” “10 each Etched/Deco,” and “88 each Acid Frosted Deco,” and that the chandeliers were worth \$580,860. **CP 156-57**. Mroczek plainly made up the statements in his sworn proof of loss regarding the quality and value of chandeliers he admittedly never saw. This is insurance fraud as a matter of law. *Cox, supra; Salovich, supra*.

The policy’s “misrepresentation” condition therefore applies, and any coverage under the Unigard policy is void. The trial court’s grant of summary judgment was thus proper and should be affirmed.

C. **Summary Judgment Should Also Be Affirmed Based On The Two Other Issues Raised In Unigard's Motion.**

Summary judgment should also be affirmed because: (1) CPW failed to meet its burden to establish that the chandeliers existed; and (2) even if the chandeliers did exist, they would have only been covered under the policy's "business personal property coverage," and Unigard has already paid the full limits of that coverage. *See, e.g., International Bhd. Of Elect. Workers v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000) (appellate court can affirm summary judgment on any basis supported by the record).

1. **CPW Failed To Meet Its Burden To Establish The Existence Of The Chandeliers For Purposes Of Showing A Covered Loss.**

As the insured under Unigard's policy, it was CPW's burden to prove the existence and amount of a covered loss. *See, e.g., Philadelphia Fire & Marine Ins. Co. v. Grandview*, 42 Wn.2d 357, 361, 255 P.2d 540 (1953); *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 158, 106 P.2d 314 (1940). Accordingly, summary judgment should still also be affirmed because CPW failed to meet its threshold burden to prove the existence, characteristics and value of the alleged chandeliers so as to qualify for coverage under the policy. For example, CPW provided no documents, receipts, invoices, gift tax returns, photographs, or any

other documentation to demonstrate that the alleged chandeliers even existed and that CPW was their owner. Also conspicuously absent is any competent testimony by anyone else who actually saw the chandeliers. Unigard's own investigation failed to turn up any information to corroborate CPW's claim and, instead, uncovered information from several sources indicating that the chandeliers never existed including, *inter alia*, undisputed documents from the Demanovich probate.

As the party claiming coverage, it was incumbent upon CPW to provide the trial court with affirmative, objective evidence to support its insurance claim for theft of the chandeliers. *See Philadelphia Fire & Marine, supra*. CPW completely failed to meet that burden, and the trial court's grant of summary judgment should be affirmed on this additional basis. *C.f., Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (defendant can move for summary judgment on ground that plaintiff lacks competent evidence to support its case).

**2. The Chandeliers Could Only Have Been Covered Under The Policy's Business Personal Property Coverage, And Unigard Has Paid The Full Limits Of That Coverage.**

Summary judgment should also be affirmed because the chandeliers – if they actually existed – could only have been covered under the policy's \$51,000 limit for loss of business personal property, and because Unigard has already paid the full amount of those limits.

Specifically, Unigard’s policy covered loss or damage to CPW’s building, including fixtures and materials on the premises used for making additions, alterations or repairs to the building.<sup>1</sup> **CP 025.** This “building” coverage had a limit of \$661,800. **CP 024.** The policy also covered personal property that was owned by CPW and used in its business. **CP 025.** Unigard undisputedly paid the full \$51,000 business personal property limits to CPW in May 2008. **CP 095.**

In proceedings below, CPW argued that the chandeliers fell within the higher limits provided under the “building” coverage. **CP 004 ¶ 9. CP 204-206.** To the contrary, the chandeliers would not fall within the building coverage for at least two reasons. First, the chandeliers were not “fixtures” because – as CPW admits – they were in boxes and were not affixed to the building at the time of the alleged theft, and CPW conceded that the chandeliers were not fixtures in responding to Unigard’s motion. **See CP 204 at lines 17-19.**

Second, the building coverage also applies to “materials on the premises used for making additions, alterations or repairs to the building.” **CP 025.** CPW claims the chandeliers were being stored in the building “with the intent of installing them in the premises.” **CP 004 at lines 13-**

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<sup>1</sup> The construction of an insurance contract is a question of law for the Court. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 476, 21 P.3d 707 (2001).

15. Other than Mroczek's post-hoc assertions, however, CPW has not produced one shred of corroborative evidence to show that it ever intended to make any "addition, alteration or repair" to the building. For example, Mroczek testified that other than doing some cleanup work, he never applied for a building permit, he had no architectural plans or drawings for the building, and he had not retained any contractors to work on the building. **CP 106.** Mroczek also testified that CPW's building was not even connected to power at the time of the alleged theft. **CP 107-108.** And, even though CPW now suggests that it took steps to obtain a loan for conversion of the building (*see* App. Brief at 5), CPW has not produced one admissible document to support that assertion. Thus, despite its professed intention to convert the warehouse into an antique museum, CPW undisputedly did nothing to bring that plan into being.

Moreover, to qualify for "building" coverage under the policy, the "materials" or "supplies" must have been "used for making additions, alterations or repairs to the buildings or structures." **CP 025 (emphasis added).** CPW's inchoate intentions regarding a possible future use of the warehouse does not establish that the chandeliers were being "used for making additions, alterations or repairs" at the time they were allegedly stolen, so as to satisfy this threshold requirement of the building coverage. *Cf. e.g. Jolley v. Regence BlueShield*, 153 Wn. App. 434, 447, 220 P.3d

1264 (2009), *review denied*, 168 Wn.2d 1038 (2010) (“nonmoving party must set forth specific facts to defeat a motion for summary judgment rather than rely on bare allegations”). Mroczek’s own testimony shows that the chandeliers were not “being used” for any purpose at the time of the alleged theft.

CPW, therefore, failed to meet its burden to establish that the chandeliers (if they existed) would qualify for the policy’s “building” coverage. Consequently the chandeliers could only have been covered – if at all – under the policy’s coverage and limits applicable to “business personal property.” And, because Unigard already paid CPW the full business personal property coverage limits, CPW cannot recover any further sums for the alleged theft of the chandeliers. Summary judgment should be also be affirmed on this ground.

**D. OMI Requests Its Fees and Expenses on Appeal Under RAP 18.1 Because CPW’s Claims And This Appeal Are Frivolous And Violate CR 11.**

Should this Court affirm the decision of the trial court, Unigard requests and award of its attorneys’ fees and costs incurred in defending against CPW’s claims in the trial court and in this appeal. Under RCW 4.84.185, a party is entitled to reasonable fees and costs incurred to oppose a claim or defense that is “frivolous and advanced without reasonable cause.” As set forth above, the undisputed evidence – including the

testimony of CPW's own principal – demonstrates that CPW's insurance claim is frivolous and fraudulent. Unigard has incurred substantial fees and costs in opposing these claims, and it respectfully requests an award of its fees and costs under RCW 4.84.185.

In addition, the signature of an attorney on a pleading constitutes a certificate that, among other things, the pleading “is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” CR 11(a). If a pleading is signed in violation of the rule, the court may impose “an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, . . . including a reasonable attorney fee.” *Id.* For the same reasons as are set forth above, Unigard requests and award of its attorney fees and costs incurred in the trial court and in this appeal under CR 11.

## V. CONCLUSION

For the foregoing reasons, Unigard respectfully submits that the trial court's order granting summary judgment was correct and should be affirmed.

DATED this 17<sup>th</sup> day of January, 2012.

SOHA & LANG, P.S.

By:   
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Gary Sparling, WSBA # 23208  
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DIVISION I

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

**DECLARATION OF SERVICE**

I am employed in the County of King, State of Washington. I am  
over the age of 18 and not a party to the within action; my business  
address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle,  
WA 98101.

On January 17, 2012, I had served a true and correct copy of the  
foregoing Brief of Respondent Unigard Insurance Company via ***E-Mail***  
**and *First Class Mail***:

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Dated this 17<sup>th</sup> day of January, 2012.

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