

No. 46679-1-II

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

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CHARLES HAYS and KRISTINA HAYS,

Respondent,

vs.

STATE FARM INSURANCE COMPANY

Appellant.

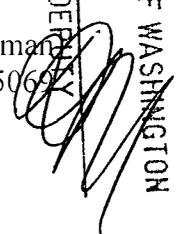
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APPEAL BRIEF

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TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
I. Introduction.....	1
II. Assignments of Error .....	3
III. Issues Pertaining to Assignments of Error.....	4
IV. Statement of the Case.....	5
A. Procedural History.....	5
B. Facts.....	5
V. Argument.....	12
A. Bad Faith Claims .....	10
B. Consumer Protection Claims.....	18
1. Plaintiff Produced Evidence of Defendant State Farm’s Violations of Washington Administrative Code.....	24
a. WAC 284-30-370.....	24
b. WAC 284-30-330 (2) .....	24
c. WAC 284-30-330(4).....	25
d. WAC 284-30-330(6).....	26
e. WAC 284-30-330(7).....	26
f. WAC 284-30-330(13).....	27
2. Plaintiffs Can Prove Injury and Proximate Causation as Required Under Consumer Protection Act.....	27
VI. Conclusion.....	29

TABLE OF AUTHORITIES

	Page
<u>STATE CASES</u>	
<i>DeYoung v. Providence Med. Ctr.</i> , 136 Wash.2d 136, 140, 960 P.2d 919 (1998).....	13
<i>Gingrich v. Unigard Sec. Ins. Co.</i> , 57 Wn. App. 424, 788 P.2d 1096 (1990).....	15, 20
<i>Hangman Ridge Training Stables v. Safeco Inc. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	19, 23
<i>Jacobsen v. Stay</i> , 89 Wn.2d 1045 569 P.2d 1152 (1977).....	12
<i>Klinke v. Famous Recipe Fried Chicken, Inc.</i> , 94 Wn.2d 255, 616 P.2d 810 (1980).....	13
<i>Kirk v Mt. Airy Ins. Co.</i> , 134 Wn.2d 558, 951 P.2d 1124 (1998).....	14
<i>Labberton v General Casualty Co.</i> , 53 Wn.2d 180, 332 P.2d 250 (1958).....	19
<i>Lish v. Dickey</i> , 1 Wn.App. 112, 459 P.2d 810 (1969).....	12
<i>Indoor Billboard/Wash, Inc. v. Intergra Telecom of Wash, Inc.</i> , 162 Wn.2d 59, 170 P.3d 10, 22 (2007).....	23
<i>Industrial Indemnity Co. of Northwest, Inc. v Kallevig</i> , 114 Wn.2d 907, 792 P.2d 520 (1990).....	19, 20

<i>International Ultimate, Inc. v. St. Paul Fire &amp; Marine Ins. Co.</i> 122 Wn.App. 736, 87 P.3d 774 (2004).....	21
<i>International Ultimate, Inc. v. St. Paul Fire &amp; Marine Ins. Co. review denied</i> 153 Wash.2d 1016, 101 P.3d 109.....	21
<i>Mason v. Mortgage America, Inc.</i> , 114 Wn.2d 842, 792 P.2d 142 (1990).....	19, 22, 28
<i>Moore v Hagge</i> , 158 Wn. App. 137, 241 P.3d 787, 791 (2010).....	12
<i>Mut. Of Enumclaw Inc. Co. v Dan Paulson Constr. Inc.</i> , 161 Wn.2d 903, 169 P.3d 1 (2007).....	14
<i>Olympic Fish Products, Inc. v. Lloyd</i> , 93 Wn.2d 596, 611 P.2d 737 (1980).....	12
<i>Panag v Farmers Ins. Co. of Wash.</i> 166 Wn.2d 27, 204 P.3d 885 (2009).....	21, 22, 27, 28
<i>Safeco Inc. Co. of Am. V. Butler</i> , 118 Wn.2d 383, 823 P.2d 499 (1992).....	14, 20
<i>Salois v. Mutual of Omaha Ins. Co.</i> , 90 Wn.2d 355, 581 P.2d 1349 (1978).....	15, 20
<i>Scott v. Pacific West Mountain Resort</i> , 119 Wash.2d 484, 487, 834 P.2d 6 (1992).....	13

<i>Sharbono v. Universal Underwriters, Inc. Co.</i> , 139 Wn.App. 383, 161 P.2d 1124 (1998).....	14, 15
<i>Smith v. Acne Paving Co.</i> , 16 Wn.App. 389, 558 P.2d 811 (1976).....	12
<i>Sorrel v. Eagle Healthcare, Inc.</i> , 110 Wn. App. 290, 38 P.2d 1024 (2002).....	21, 22, 28
<i>St. Paul Fire &amp; Marine Inc. Co. v Onvia, Inc.</i> , (2008) 2008 WL 5006458.....	13, 14, 15, 19, 21
<i>Underwriters Subscribing to Lloyd's Ins. Cert. No. 80520 v. Magi, Inc.</i> , 790 F.Supp. 1043 (E.D. Wash.1991).....	20
<i>Unigard Ins. Co. v. Leven</i> , 97 Wn.App. 417, 983 P.2d 1155 (1999).....	20

REGULATIONS AND RULES

RCW 19.86.020.....	18, 19
RCW 19.86.090.....	19, 23
RCW 19.86.170.....	19
RCW 19.86.920.....	18
RCW 48.01.030.....	20

WASHINGTON ADMINISTRATIVE CODE

WAC 284-30-330(2).....	24
WAC 284-30-330(4).....	25
WAC 284-30-330(6).....	26
WAC 284-30-330(7).....	26
WAC 284-30-330(13).....	27
WAC 284-30-370.....	24

## I. INTRODUCTION

For two years, State Farm refused to properly and reasonably investigate and value the Hays' first property claim subsequent to a residential fire. State Farm consistently failed to adhere to good faith standards, failing in their duties to treat the Hays financial interests equal to that of its own. Rather, State Farm steadfastly asserted a position of *significantly* undervaluing the Hays' claim for damage to their home.

As a result, the Hays were forced to utilize a valuation tool provided by their insurance policy, an appraisal. The parties agreed upon appraisal process resulted in the Hays award for their policy limits. Unfortunately, by the end of the appraisal process, *two years* after the fire, State Farm could rest on the expiration of the 24 month contractual obligation to provide an alternative residence and left the Hays unable to rebuild or replace their home and at the same time pay for their interim residence. As a result, the Hays were left to endure a subsequent two years of hardship. They were forced to pay for a leased residence while maintaining their mortgage for a burned property. With the family finances stretched beyond limits, causing the loss of truck used for Mr. Hays' business, it took those two years to get into position to be able to start to rebuild on the property.

It is without question that had State Farm properly and reasonably investigated and valued the Hays' structural claim within a reasonable time frame after the fire, the Hays would have been able to rebuild and/or replace their home within the time frame State Farm was contractually

obligated to pay for a leased residence.

Nonetheless, the trial court dismissed the Hays' bad faith claims and Consumer Protection Act claims – a clear error of law.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting summary judgment in favor of State Farm on the Hays' bad faith claims.
2. The trial court erred in granting summary judgment in favor of State Farm on the Hays' Consumer Protection Act claims.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether there is a material issue of fact regarding whether State Farm engaged in bad faith claims practices.

(Assignment of Error No. 1)

2. Whether there is a material issue of fact regarding whether State Farm violated the Consumer Protection Act.

(Assignment of Error No. 2)

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural History**

In February 2013, The Hays filed a lawsuit against State Farm alleging bad faith claims practices and violations of the Consumer Protection Act for State Farm's claims administration after a fire destroyed their home. CP 1-9. In August 2014, the Court granted State Farm's motion for summary judgment on both of the Hays' claims. CP 374-75. The granting of summary judgment was in error.

##### **B. Facts**

Charles and Krista Hays own property located at 19721 N. Highrock Road, Monroe, Washington. The property, several acres, included a manufactured home where they resided with their three children. The Hays' own several horses, which are kept on the property. CP 183, 253. In approximately 2000, the Hays spent in excess of \$30,000 to remodel their home. Subsequent to the remodel, the Hays applied for home owner's insurance with their State Farm agent. The State Farm agent assessed the then current market value of the house to be \$65,000 and insured the property for an actual cash value of \$65,000. CP 184, 253.

The Hays purchased a homeowner's insurance policy from State Farm, Policy Number 47-EG-8209-1, to provide protection from losses that may result from accidental damage to the their home and personal property contained in the home. The Policy had limits of \$65,000 for the dwelling. The coverage for dwelling was actual cash value coverage. CP 184, 253, 242-45.

On or about February 9, 2010, the Hays' home was damaged as a result of a kitchen fire. The damage was significant such that the Hays had to move out while repairs were made, but the fire did not destroy the home. CP 184, 253.

Unfortunately, on February 19, 2010, the Hays' home suffered a second fire, this one much more severe and destroyed a substantial portion of the structure. State Farm immediately recognized that the damages far exceeded the policy limit of \$65,000. CP 184, 253, 340, 344-45.

Within approximately a month after the second fire, State Farm sent the Hays a check for approximately \$16,000, alleging that sum to be the full actual cash value of the Hays' home. In response to this, the Hays went to see their State Farm agent. CP 184, 253. Through their Agent, the Hays provided State Farm with a copy of an appraisal that was done on the property several years prior, which they believed did not account for the remodel. The Hays specifically informed State Farm that the appraisal was done by a party that attempting to buy the Hays' property. The Hays disagreed with the appraisal at that time and were clear with State Farm that the only reason it was submitted to State Farm was to show them how completely unreasonable the \$16,000 actual cash value assessment was. CP 184, 236.

State Farm later claimed that the Hays recommended State Farm use the same appraiser as had been previously involved with the attempted purchase of their property. However, the Hays did not make such a recommendation. In fact, the Hays were clear that they disagreed with

that appraiser. CP 184, 236.

In May 2010, State Farm issued the Hays a check in the amount of \$32,580. The notation on the check indicated that the money was for the actual cash value of the damaged structure. However, there was no accompanying explanation as to how State Farm determined the actual cash value. The Hays attempted on several occasions to get information pertaining to the check, but each attempt was ignored. The Hays left phone messages for the State Farm adjuster asking for further information regarding the structure settlement. CP 185, 236.

Later in the claim, State Farm produced a “copy” of a letter that was supposedly sent to Plaintiffs with the check. However, this letter is not a “copy” – it is not on State Farm Letterhead like *all* other correspondence, it is in completely different font than *all* other correspondence, and it is unsigned. The Hays never received this letter, or any version of it. State Farm did not inform the Hays *how* they reached the valuation. State Farm never informed the Hays of why the actual cash value policy had a limit of \$65,000 while they valued the actual cash value of the residence to be \$30,000. CP 185, 236.

Between June 2010 and October 2010, the Hays sent several letters and left numerous phone messages regarding the status of their claim and the manner in which State Farm did their valuation. The letters and most of the voice mails were not returned. CP 185, 237. In October 2010, the Hays sent State Farm a letter to a supervisor at State Farm. The Hays complained that the assigned adjuster, Lindsey Person, issued a payment

to the structure claim without explanation regarding how the payment was calculated and why it was for less than the insured actual cash value of the home. They also complained that their repeated attempts to contact her and her direct supervisor were never returned, they sought assistance in obtaining and handling proof of loss forms regarding their claim, and they again requested a copy of their insurance policy. Importantly, the Hays specifically stated that their home had previously been appraised for \$65,000 market value, and was insured for this value. Accordingly, they questioned the actual cash value determination of \$32,580. The Hays specifically stated that they wanted State Farm to have the opportunity to correct and address these issues. CP 185-86, 191-92, 237, 247-48.

In late October 2010, a State Farm representative contacted the Hays by phone and informed them they he would look into the issues they raised, including information regarding the claim valuation and obtaining a copy of their policy. CP 186, 237.

In December 2010, the Hays had still not received an explanation regarding the disparity between their actual cash value policy of \$65,000 and State Farm's actual cash value assessment of \$32,580. Further, the Hays had not received a copy of their insurance policy. The Hays wrote a certified letter to State Farm. CP 186, 237, 250. In response, State Farm sent the Hays a copy of an October 2010 letter that had been sent to their old address (the burned property where they were no longer living) which was purported to include a copy of an appraisal. State Farm had still not provided a copy of their insurance policy. CP 186-237.

It was in December 2010 that the Hays first learned that State Farm has utilized appraisal company Town and Country to form its actual cash value determination. It was also at this time that the Hays learned that State Farm asserted Town and Country was a vendor recommended by the Hays. This was problematic for several reasons. First, the Hays did not recommend Town and Country as an acceptable or agreed upon appraisal company. This was a manipulation of the facts. Second, Town and Country valued the home at \$86,000, but then applied an unreasonable depreciation, in excess of 50%, for a house with a recent remodel that altered the manufactured home into more residential construction. There was no reasonable explanation provided for this depreciation. CP 186, 238.

In January 2011, frustrated with State Farm's delay in addressing their issues with the claim *and* with State Farm's manipulation of facts and depreciation values, the Hays retained the services of a public adjuster to assist them with their claim. CP 292, 296. Through their public adjuster, the Hays again took issue with the \$30,000 market appraisal of their home. They claimed that while the appraisal indicated a \$86,000 value, it applied an unreasonable depreciation – and one that was significantly less that had been determined by State Farm when insuring the property. CP 187, 194-96, 238, 252-54, 292.

On March 21, 2011, through their public adjuster, the Hays submitted to State Farm a formal Proof of Loss, inclusive of an actual cash value of the dwelling which exceeded policy limits of \$65,000 and a

\$10,000 claim for the damaged deck under extended coverage as the deck was a separate structure (a requirement of the local building codes). CP 187, 198-216, 238, 256-74, 292, 298-316.

On April 6, 2011, State Farm rejected the Hays' deck claim under the dwelling extension coverage, and refused to negotiate the actual cash value of Plaintiffs' home. State Farm refused to recognize that the Hays home was more residential construction than manufactured home after the remodel. CP 187, 218-20, 239, 292, 318-20. In response, the Hays demanded an appraisal, an alternative dispute resolution tool provided by the Policy to resolve claim valuation disputes. Ultimately, the parties agreed to submit the disputed issues to Roger Howson, at Claim Dispute Resolution. CP 187, 222-24, 239, 276-78, 292, 322-24.

On December 16, 2011, Mr. Howson issued an award, with an actual cash value award of \$60,603.21 for the damaged structure and an award for the damaged deck pursuant to extended appurtenant structure coverage, in the amount of the policy limit of \$10,000. CP 187, 226-33, 239, 280-87, 294, 326-33, 340, 347-54.

State Farm issued a check for \$30,893.03 in January 2012. Included in this payment was \$24,510.18 toward the appraisal award of \$70,603.21 for the structural claim. State Farm asserted that a total of \$49,343.03 had already been paid out towards that claim. Of the \$49,343.03, State Farm claimed \$7,873.69 was paid toward demolition, \$32,850 toward the actual cash value of the home, and \$500 deductible, and \$8,119.34 towards the February 9, 2010 fire claim. CP 187, 239, 289-

90, 294, 335-36.

State Farm's self credit for the \$8,119.34 payment from the February 9, 2010 was incorrect and done without explanation. CP 340, 356, 294. Therefore, State Farm failed to fully pay the appraisal award. The Hays, through their public adjuster attempted to address this issue with State Farm. On August 31, 2012, State Farm had contact with the public adjuster and was made aware that the appraisal award had not been fully and properly paid. State Farm, according to its own file and activity logs, did nothing to correct this issue. CP 340, 358.

State Farm paid additional living expenses pursuant to the Policy for the entire time period that the Policy mandated, two years. However, two years after the fire, the claim had not been properly paid. As a result, the Hays could not move back on their property and were required to continue to live in a rental and maintain their mortgage payments. Starting in February, 2012, the Hays became responsible for both. CP 188, 239.

Upon being responsible for both, the Hays initially struggled with maintaining their mortgage and fell a few months behind. In addition, without the entire appraisal award, the Hays struggled to begin to replace their home on their property. Therefore, in approximately June 2012, the Hays' mortgage company took the insurance funds and applied them to the mortgage. CP 188, 239-40.

Since February 2012, the Hays have lived in several leased residences, depending upon what they could afford. During this time, not

only have the Hays also paid their property mortgage, but have paid utilities at both the leased residences and their property so that they could continue to property care for their horses that were maintained on their property. The need to be at the property daily to care for the horses also required the Hays to incur significant extra expenses in gas and mileage. CP 188, 239-40.

## V. ARGUMENT

An appellate court review an order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Moore v. Hagge*, 158 Wn. App. 137, 146, 241 P.3d 787, 791 (2010).

The purpose of summary judgment is to avoid an unnecessary trial when there is no genuine issue of material fact. However, a trial is absolutely necessary if there is a genuine issue as to any material fact. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980); *Jacobsen v. Stay*, 89 Wn.2d 1045 569 P.2d 1152 (1977). Thus, a court must be cautious in granting a summary judgment so that worthwhile causes will not perish short of a determination of their true merit. *Smith v. Acne Paving Co.*, 16 Wn.App. 389, 558 P.2d 811 (1976). If a genuine issue of fact exists as to any material fact, a trial is not useless; rather it is necessary. *Lish v. Dickey*, 1 Wn.App. 112, 459 P.2d 810 (1969).

A genuine issue of material fact exists where reasonable minds could reach different factual conclusions after considering the evidence. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 616 P.2d

644 (1980). Furthermore, on a motion for summary judgment, a trial court is required to view all evidence, draw all reasonable inferences in favor of the nonmoving party, and deny the motion if the evidence and inferences create any question of material fact. *DeYoung v. Providence Med. Ctr.*, 136 Wash.2d 136, 140, 960 P.2d 919 (1998); *Scott v. Pacific West Mountain Resort*, 119 Wash.2d 484, 487, 834 P.2d 6 (1992).

Defendant State Farm has the initial burden of presenting evidence that there is no genuine issue as to any material fact and that the company is entitled to a judgment as a matter of law on Plaintiff's IFCA, bad faith and consumer protection claims. Genuine issues of material facts exist relating to whether State Farm unreasonably and untenably delayed agreeing to the proper value of the claim, whether State Farm unreasonably and untenably refused to pay the appurtenant structure claim, and whether State Farm appropriately acted in good faith in handling the Hays' claim. Since there are genuine issues of material fact, State Farm was *not* entitled to summary judgment, and its motion should have been denied.

**A. Bad Faith Claims.**

Washington's insurance bad faith law derives from statutory and regulatory provisions, and the common law. *St. Paul Fire & Marine Inc. Co. v. Onvia, Inc.*, (2008) 2008 WL 5006458. The law of bad faith insurances practices in the State of Washington is based from two main sources: (1) statutory duty of good faith and case law defining the duty of

good faith, and (2) duties enumerated in the Washington Administrative Code, regulating the actions of insurance companies during claims administration.

In addition to being statutorily mandated, the duty of good faith between an insurer and an insured arises from a source akin to a fiduciary duty. *Id.* This quasi-fiduciary relationship implies *more than honesty and lawfulness of purpose* which comprises a standard definition of good faith; it implies a ***broad obligation of fair dealing*** and ***a responsibility to give equal consideration to the insured's interest.*** *Id.*

A claim of bad faith is analyzed applying the same principles as any other tort: duty, breach of duty, and damages proximately caused by the breach of the duty. *St. Paul Fire & Marine Inc. Co. v. Onvia, Inc.*, (2008) 2008 WL 5006458, citing *Mut. Of Enumclaw Inc. Co. v. Dan Paulson Constr. Inc.*, 161 Wn.2d 903, 914, 169 P.3d 1 (2007); and *Safeco Ins. Co. of Am. V. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). The breach must have been unreasonable, frivolous, or unfounded as opposed to a good faith mistake. See *Sharbono v. Universal Underwriters Inc. Co.*, 139 Wn.App. 383, 161 P.3d 406 (2007); and *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998).

As defined by the Washington State Supreme Court in *St. Paul Fire & Marine Inc. Co. v. Onvia, Inc.*, (2008) 2008 WL 5006458, an insurer owes its insured a broad duty of fair dealing and responsibility to give equal consideration to the insured's interest. A breach of this duty does not

require intentional bad faith or fraud. *Sharbono v. Universal Underwriters Inc. Co.*, 139 Wn.App. 383, 161 P.3d 406 (2007).

***The question of whether an insurer acted in bad faith is one of fact.*** *St. Paul Fire & Marine Inc. Co. v. Onvia, Inc.*, (2008) 2008 WL 5006458. The bad faith action of an insurance company is a violation of the Consumer Protection Act. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 433, 788 P.2d 1096 (1990), *citing Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 359, 581 P.2d 1349 (1978).

In the case at hand, throughout the entirety of the claim, the evidence shows that State Farm failed to meet its obligation of fair dealing and failed in its responsibility to give equal consideration to the Hays' interests:

- At the onset of the claim, State Farm presents an actual cash value check for the home in the amount of approximately \$16,000, without explanation.
- After being challenged on the first valuation, State Farm, *three months after the fire*, presented the Hays with an actual cash value check for \$32,580, without providing any explanation regarding valuation.
- From June 2010 through October 2010, State Farm ignored the Hays request for explanation regarding the \$32,580 actual cash value calculation and their request for a copy of their Policy. The Hays specifically inquire why they were paying for a policy limit of \$65,000 actual cash value, based upon State Farm's initial valuation when selling the policy, and now valuing the home to be less than half that value.
- In October 2010, State Farm specifically promised the Hays to provide explanation of the actual cash value

calculation and a copy of the policy. These were not provided for another two months.

- In December 2010, State Farm reveals that the basis for their \$32,580 actual cash value calculation was a Town and Country appraisal.
- State Farm alleges that the Hays recommended Town and Country to conduct the appraisal. This is not true.
- The Town and Country appraisal failed to address the Hays home in its remodeled state as more residential construction, treating it solely as only a manufactured home.
- The Town and Country appraisal valued the home to be \$86,000, but applies a depreciation of more than 50%. There is no explanation for why a recently remodeled home is depreciated by this amount.
- The Hays first received a copy of their Policy in December 2010, *eight months after the fire*, and are then first aware that extended coverage is available for separate structures, applicable to the deck of their home as the county codes required the deck to be built as a separate structure.
- In March 2011, the Hays, through their public adjuster, sent State Farm a formal claim with proof of loss, documenting the home to be more than a manufactured home and establishing actual cash value to be in excess of the \$65,000 policy limit. They also claim for the \$10,000 limit for the deck as a separate structure.
- State Farm failed to investigate the Hays claim and documentation, continuing to rely upon the Town and Country appraisal, which has been established as clearly inapplicable. State Farm also rejected the deck claim.
- State Farm continually valued the Hays home as only a manufactured home, failing to recognize the remodel of the home as more similar to a permanent residence.

- In December 2011, an independent appraiser agrees with the Hays valuation of their home and the claim for the deck. The appraiser recognized the model to be more akin to residential construction. Accordingly, the appraiser awarded \$60,603.21 for the dwelling claim and \$10,000 for the deck claim.
- State Farm failed to pay the entire amount of the award, giving itself credit for \$8,119.34 that had been paid towards work done on the Hays' first fire claim.

State Farm's actions from the beginning of the claim through to the end of the claim establish that State Farm failed to treat the Hays' interest equal to that of their own. State Farm focused solely upon payment of the least amount that they could get away with, until an independent appraiser established that they were wrong. State Farm delayed the claim by refusing to provide proper information regarding the manner in which they valued the claim. State Farm delayed the claim by failing to provide a copy of the Policy. Once they provided such information and the Policy, State Farm refused to acknowledge any information which contradicted their valuation. Further evidencing State Farm's failure to properly and reasonably investigate and value the Hays claim is the independent appraiser, Roger Howson, Claim Dispute Resolution, valuation and appraisal award. Mr. Howson awarded \$60,000 actual cash value for the house and \$10,000 for the deck claim.

Ultimately, the Hays were provided nearly the entire amount that was due under the Policy (less the \$8,111 that State Farm took credit from the previous claim). However, the Hays were forced to endure

significant delays caused by State Farm's continued unreasonableness and failure in their investigations and negotiations. These delays resulted in the payment of the claim at the end of the period for available additional living expenses. As a sole and direct result, the Hays lost the monies to rebuild and replace their home to the mortgage company. The Hays have been without a home on that property since, being required to still maintain a mortgage and a rental property.

At a minimum, there is a material issue of fact as to whether State Farm acted reasonably in the investigation of the Hays home, in their failing to provide requested information and copy of the Policy, in their response to the documentation and claim provided by the Hays, and in their failure to pay the entire appraisal award. The trial court erred in granting summary judgment in favor of State Farm.

**B. Consumer Protection Claims.**

The Washington legislature enacted the Consumer Protection Act to protect the public from unfair, deceptive, and fraudulent acts and practices. *See* RCW 19.86.920. In furtherance of its intent, the legislature Declared "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" to be unlawful. RCW 19.86.020. The Consumer Protection Act allows for private actions to enforce its terms. Thus, "[a]ny person who is injured in his or her business or property by a violation of RCW 19.86.020 may bring a civil action... to enjoin further violations, to recover... actual damages..., or

both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion . . . award... three times the actual damages... not [to] exceed ten thousand dollars." RCW 19.86.090.

In *Hangman Ridge Training Stables v. Safeco Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986), the Washington Supreme Court distilled these statutory provisions to five elements that must be proved to successfully prosecute a private Consumer Protection action. These five elements are: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that has a public interest impact; and (4) injury to business or property; (5) caused by the unfair or deceptive practice. *Hangman Ridge*, 105 Wn.2d at 780. "Property" may be intangible property. See *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990); and *Labberton v. General Casualty Co.*, 53 Wn.2d 180, 186, 332 P.2d 250 (1958).

An insurer's unfair claims settlement practices may be pursued as violations of the Consumer Protection Act in several ways. For instance, actions and transactions prohibited or regulated under the laws administered by the Washington Insurance Commissioner are subject to the provisions of RCW 19.86.020. RCW 19.86.170. As such, violations of such regulations may also constitute violations of the Consumer Protection Act. *Industrial Indemnity Co. of Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 922, 792 P.2d 520 (1990); *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129, 196 P.3d 664, 667 (2008). Even

a single violation of the insurance regulations is sufficient to prove a *per se* unfair or deceptive acts or practice. *Kallevig*, 114 Wn.2d at 923.

Additionally, an insurer's violation of the duty of good faith under RCW 48.01.030 may be considered a *per se* violation of the Consumer Protection Act (CPA). *Gingrich v. Unigard Security Ins. Co.*, 57 Wn.App. 424, 788 P.2d 1096 (1990). An insurer has a duty to use both good faith and reasonable care in handling insurance claims that arises out of the quasi-fiduciary duty owed to an insured by an insurer as well as the duty of good faith and fair dealing inherent in any contract. *Safeco Ins. Co. v. Butler*, 118 Wn.2d at 389, 823 P.2d 499 (1992). While an insurer's breach of good faith creates a cause of action sounding in tort, *id.*, an insurer's breach of its duty of good faith constitutes a violation of the Consumer Protection Act as well. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 433, 788 P.2d 1096 (1990), *citing Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 359, 581 P.2d 1349 (1978). This is because an insurer's duty of good faith is statutorily prescribed by the Revised Code of Washington. *See id.*; RCW 48.01.030.

Whether insurer acted in good faith in administering a claim, for purposes of Washington's Consumer Protection Act, depends upon reasonableness of its actions. *Underwriters Subscribing to Lloyd's Ins. Cert. No. 80520 v. Magi, Inc.*, 790 F.Supp. 1043 (E.D.Wash.1991). An insurer violates the Consumer Protection Act if it acts without reasonable justification in handling a claim by its insured. *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999). For purposes of determining

whether an insurer acted without reasonable justification so as to support a Consumer Protection Act claim, the test is not whether the insurer's interpretation is correct, but whether the insurer's conduct was reasonable. *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.* 122 Wn. App. 736, 87 P.3d 774 (2004), *review denied* 153 Wash.2d 1016, 101 P.3d 109. Under a bad faith theory, an insurer may be held liable for violating the Consumer Protection Act based simply on "procedural missteps" even when the insurer has not breached a duty to defend, settle, or indemnify the insured. *Onvia*, 165 Wn.2d at 132 (2008).

The fourth *Hangman Ridge* element requires proof that an unfair or deceptive act caused injury to a Consumer Protection Act claimant. For the purpose of a Consumer Protection act claim, however, the "injury" suffered is distinct from "damages." *Panag v. Farmers Ins. Co. of Wash.* 166 Wn.2d 27, 58, 204 P.3d 885 (2009). "Monetary damages need not be proved; unquantifiable damages may suffice." *Id.* "[T]he injury requirement is met upon proof the plaintiffs property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal." *Id.* at 57 (internal quotations omitted). In support of this rule, the Supreme Court in *Panag* cited to a Washington Court of Appeals case, *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002). In *Sorrel*, the Court of Appeals, after noting that "no monetary damages need be proven so long as there is some injury to property or business," concluded that "sufficient injury to satisfy the fourth and fifth elements of a Consumer Protection Act

claim is established when a plaintiff is deprived of the use of his property as a result of an unfair or deceptive act or practice." *Sorrel*, 110 Wn. App. at 298, *cited with approval in Panag*, 166 Wn.2d at 58. As such, the Court found that the plaintiff's Consumer Protection Act claim should not have been dismissed for failure to demonstrate injury when the plaintiff presented evidence that he was denied rightful possession of his funds for a period of only two weeks. *Sorrel*, 110 Wn. App. at 298-99.

Additionally, the Washington Supreme Court held that proof of loss of use of property that is causally related to an unfair or deceptive act or practice is sufficient to prove the fourth element of a Consumer Protection Act violation and thus sufficient to permit recovery of attorneys' fees and costs under the Consumer Protection Act. *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990), *cited with approval in Panag*, 166 Wn.2d at 58,

The fact that the Consumer Protection Act allows for injunctive relief bolsters the conclusion that injury without specific monetary damages will suffice. *Mason*, 114 Wn.2d at 843. More importantly, a distinction between non-pecuniary "injury" and actual, pecuniary damages furthers the basic purpose of allowing a private cause of action for violations of the Consumer Protection Act. By definition, the public has an interest in violations of the Consumer Protection Act. The distinction between injury and actual damages has the effect of incentivizing private parties to correct public wrongs by allowing for recovery of attorney's fees and costs even when actual damages are minute or non-existent.

The fifth *Hangman Ridge* element requires that a causal link be established between the unfair or deceptive act complained of and the injury suffered. *Hangman Ridge*, 120 Wn.2d at 784. Causation, for the purposes of proving the fifth element of a Consumer Protection Act claim, refers to simple proximate causation. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10, 22 (2007). Proximate cause is a cause which, in a direct sequence, unbroken by any superseding cause, produces the injury complained of and without which such injury would not have happened. *Id.*, citing WPI 15.01.

The case law in Washington is therefore very clear. An insurance company that violates the insurance regulations or that breaches its statutory duty of good faith may be found liable for violations of the Consumer Protection Act. Additionally, for the purposes of demonstrating "injury" *per* RCW 19.86.090 and *Hangman Ridge*, the term "injury" is distinct from actual, pecuniary damages, and each are dealt with on separate bases.

Defendant's Motion for Summary Judgment seeking dismissal of Plaintiffs' Consumer Protection Act Claim focuses primarily on WAC violations alleged by Plaintiffs. However, Plaintiffs' CPA claims are not limited to just the WAC violations, but include the allegations of failing to deal in good faith and failing in its fiduciary duties, as outlined above. Thus, Plaintiffs' CPA claims stand without evidence of specific WAC violations. Additionally, Plaintiffs' will be able to present evidence of

WAC violations. Further, Plaintiffs will be able to establish injury as required by the CPA.

**1 Plaintiffs Produced Evidence of Defendant State Farm's Violations of Washington Administrative Code.**

Plaintiffs produced evidence that State Farm violated numerous WAC provisions.

**a. WAC 284-30-370.**

WAC 284-30-370 requires that an insurance company complete its investigation within thirty (30) days after the notice of the claim.

State Farm's ultimate position in claim settlement was asserted in May 2010, three months after the fire. This is obviously past the thirty day time limit. Even more problematic is the fact that it appears that State Farm never completed an investigation. The fact that the independent appraiser clear concluded that the Hays home was not a mere manufactured home, but was in part a residential structure is evidence that State Farm did not complete an investigation – as State Farm refused to acknowledge or observe the Hay home as anything other than a pure manufactured home.

Defendant State Farm clearly violated WAC 284-30-370. At a minimum, there is a genuine material issue of fact for a trier of fact to decide, whether Defendant State Farm's delay in investigations were reasonable.

**b WAC 284-30-330(2).**

WAC 284-30-330(2) requires an insurance company to act reasonably promptly upon communications with respect to claims. The

evidence is clear that on numerous occasions, Defendant State Farm failed to respond reasonably promptly to Plaintiffs' communications.

The Hays made many attempts throughout the summer and fall of 2010 to obtain information regarding State Farms valuation of their claim and to obtain a copy of their Policy. State Farm did not provide the information or the policy until December 2010.

It is clear that State Farm failed to respond reasonably to the Hays' communications.

**c WAC 284-30-330(4).**

WAC 284-30-330(4) prohibits an insurance company from refusing to pay claims without conducting a reasonable investigation.

State Farm refused to pay the Hays claim, only the claim as State Farm valued it. There is clear evidence that State Farm did not conduct a reasonable investigation. The crux of the issue in the valuation was State Farms insistence on viewing the Hays home as a pure manufactured home, rather than as a residential structure in part. The Town and Country appraisal is evidence of this. If State Farm had conducted a reasonable investigation, they would have concluded just as the appraiser did – that the property was, in part, a residential structure and not a pure manufactured home.

At a minimum, there is a material issue of fact as to whether State Farm's sole reliance on the Town and Country appraisal, failing to recognize the residential construction of the home, was reasonable.

**d. WAC 284-30-330(6).**

WAC 284-30-330(6) requires an insurance company to attempt in good faith to effectuate prompt, fair, and equitable settlements in which liability has become reasonably clear.

Given the large disparity between the independent appraiser's valuation (which was strikingly similar to that of the Hays) and State Farm's valuation, it is clear that State Farm did not act in good faith. The fact that State Farm failed to provide information regarding the manner in which they obtained their valuation establishes the lack of good faith. Moreover, State Farm's refusal to acknowledge the documented valuation presented by the Hays and negotiate based upon their presentation establishes that State Farm did not act in good faith.

It is clear that Defendant State Farm violation WAC 284-30-330(6). At a minimum, there is a genuine material issue of fact for a trier of fact to decide whether Defendant State Farm attempted in good faith to effectuate a fair and equitable settlement.

**e. WAC 284-30-330(7).**

WAC 284-30-330(7) prohibits an insurance company from compelling a claimant to litigation or appraisal by offering substantially less than the amounts ultimately recovered.

Defendant State Farm offered \$32,580 to settle the Hays' dwelling claim. This forced the Hays to demand and participate in an appraisal in order to obtain the rightful award, in excess of \$70,000.

Defendant State Farm violated WAC 284-30-330(7). At a minimum, there is a genuine material issue of fact whether Defendant State Farm compelled appraisal by offering substantially less than what Plaintiffs recovered at appraisal.

**f WAC 284-30-330(13).**

WAC 284-30-330(13) requires an insurance company to provide a reasonable explanation of the basis in an insurance policy in relation to the facts as to the reasons for the offer of a compromised settlement.

Defendant State Farm offered \$32,580 to settle the Hays structure claim, a significant compromise from the claim submitted by the Hays. It took eight months for State Farm to provide any information regarding the manner in which they obtained their valuations. Once State Farm was presented with the Hays claim, State Farm never provided any reason for why the Hays valuation was improper, or why State Farm refused to recognize that the Hays home was not a pure manufactured home.

Defendant State Farm violated WAC 284-30-330(13). At a minimum, there is a genuine material issue of fact whether Defendant State Farm failed to provide a reasonable explanation for the compromised settlement offer.

**2. Plaintiffs Can Prove Injury and Proximate Causation as Required Under Consumer Protection Act.**

Plaintiffs are not required by either the Consumer Protection Act or *Hangman Ridge* to prove monetary damages. *Panag v. Farmers Ins. Co. of Wash.* 166 Wn.2d 27, 58, 204 P.3d 885 (2009). To the contrary, the

Plaintiff may demonstrate injury for the purpose of proving a Consumer Protection Act claim if the Plaintiff shows that she was denied rightful possession of her funds. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002), *cited with approval in Panag*, 166 Wn.2d at 58. Moreover, the Plaintiff may provide evidence of loss of use of property to prove the fourth element of a Consumer Protection Act violation. *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990). The loss of use of property which is causally related to an unfair or deceptive act or practice is sufficient injury to constitute the fourth element of a Consumer Protection Act violation. *Id.* No monetary damages need be proven; nonquantifiable injuries will suffice. *Panag*, 166 Wn.2d at 57

Plaintiffs have provided evidence that they were both denied rightful possession of funds pursuant to their claim until October 2009 after the appraisal award, possession of monies that should have been paid under additional living expense benefits, and that they had lost the use of their property until October 2010, although they had to maintain their mortgage payments from the loss in August 2007. From May 2008, when additional living benefits were terminated through October 2010, Plaintiffs paid \$40,934.66 towards the mortgage of a home they could not use.

The facts as outlined above, viewed in a light most favorable to the Plaintiff, evince pernicious and deliberate acts by Defendant Liberty Mutual to systematically delay making payment in indemnification of the Plaintiffs' losses and to frustrate Plaintiffs' attempts to achieve full

compensation for their claims. The result of Defendant Liberty Mutual's actions was that Plaintiffs were denied possession of monies that should have been paid to them, the loss of use of their house, and incurred costs of the appraisal in excess of \$26,000.

Considering all of the evidence available in a light most favorable to the Plaintiff, the Plaintiff provided evidence of injury sufficient to defeat the Defendant's Motion for Summary Judgment. In fact, Plaintiff has established *actual quantifiable damages*, more than required by *Panag* to establish a viable Consumer Protection Claim.

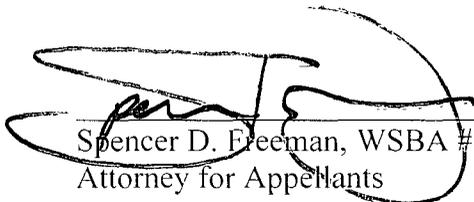
The trial court erred in granted summary judgment in favor of State Farm.

## VI. CONCLUSION

The Hays submitted evidence that established State Farm failed in its fiduciary duties under the insurance policy *and* violated provisions of the Washington Administrative Code. Accordingly, the trial court erred in granting summary judgment in favor of State Farm, dismissing the Hays' claims of bad faith and violations of the Consumer Protection Act.

The trial court's summary judgment should be reversed.

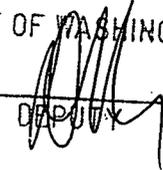
DATED this 16<sup>th</sup> day of March, 2015.

  
Spencer D. Freeman, WSBA #25069  
Attorney for Appellants

FILED  
COURT OF APPEALS  
DIVISION II

2015 MAR 16 PM 3:36

STATE OF WASHINGTON

BY  DEPUTY

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

CHARLES HAYS and KRISTA HAYS,

Case No.: 46679-1-II

Respondent,

**CERTIFICATE OF SERVICE**

vs.

STATE FARM INSURANCE COMPANY,

Appellants.

I, Jeff Cully, am above the age of eighteen (18) years old and am competent to testify,  
and could testify from personal knowledge to the contents herein.

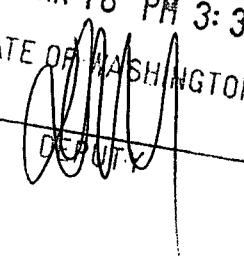
I certify that on March 16, 2015 at approximately 3:15pm, I caused a true and correct  
Appeal Brief in the above referenced case matter to be delivered by hand to the following  
location:

Washington State Court of Appeals  
Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402  
Telephone No. 253-593-2970  
Fax No. 253-593-2806

1 I declare under the penalty of perjury under the laws of the State of Washington that the  
2 foregoing is true and correct.

3 Signed this 16<sup>th</sup> Day of March, 2015, at Tacoma, Washington.  
4

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6  
7  
8  A handwritten signature in black ink, appearing to read "Jeff Cully", is written over a horizontal line. The signature is stylized and cursive.  
9

FILED  
COURT OF APPEALS  
DIVISION II  
2015 MAR 16 PM 3:36  
STATE OF WASHINGTON  
BY   
DEPUTY

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

CHARLES HAYS and KRISTA HAYS, each  
individually and a marital community comprised  
thereof,

Appellant,

vs.

STATE FARM INSURANCE COMPANY, a  
foreign insurance company,

Respondent.

Case No.: 46679-1-II

**DECLARATION OF MAILING**

I, Jeff Cully, under penalty of perjury under the laws of the State of Washington, declare and state as follows:

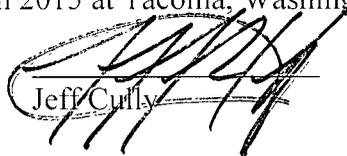
1. I deposited in the mails of the United States Postal Service (USPS) a properly stamped and addressed package, postage prepaid, addressed to:

A. Attorney Gregory Worden, Lewis Brisbois Bisgaard & Smith, LLP., 2101  
Forth Avenue, Suite 700, Seattle, WA 98121

2. Said envelope contained a true and correct copy of the:

- Appeal Brief
- Declaration of Mailing
- Declaration of Service to Court of Appeals

EXECUTED this 16<sup>th</sup> day of March 2015 at Tacoma, Washington

  
Jeff Cully