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STATE OF WASHINGTON

DIVISION II OF THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

MICHAEL POOLE and VICKY POOLE,

Respondent,

vs.

STATE FARM INSURANCE COMPANY

Appellant.

APPEAL BRIEF

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ORIGINAL

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I. INTRODUCTION

The trial court erred in enforcing State Farm's unreasonable and untenable interpretation of a provision of the Pooles' homeowner's insurance policy.

The Pooles purchased a limits extension on their policy, referred to as Option ID Dwelling Extension, which provided for a determined amount of extra funds to be available if the actual costs to rebuild a damaged dwelling exceeded that limits of the policy. The Pooles incurred such extensive costs in rebuilding, as was explicitly anticipated by State Farm. The Pooles rebuilt the shop, originally attached to their home at the time of the loss and therefore considered a "dwelling" under the Policy, as a separate structure, 35 feet away from the rebuilt home. As a result of separating the structures, State Farm denied any of the costs rebuilding the shop as a part of rebuilding the dwelling. Therefore, State Farm denied paying the Pooles dwelling extension limits under the Option ID Dwelling Extension. State Farm explicitly stated that if the rebuilt shop shared a wall with the rebuilt residence, the dwelling extension would have applied.

State Farm representative admitted during deposition that reasonable minds may disagree with their interpretation of the dwelling extension provision. Although the law requires all ambiguities to be resolved in favor of the policyholder, State Farm obtained summary judgment dismissing the Pooles' breach of contract claim, as well as their bad faith and consumer protection claims.

The cost of rebuild clearly triggered the Option ID coverage, and State Farm inexplicably misrepresented the replacement cost value of the loss throughout the claim, conceding only at deposition.

Material issues of fact exist that mandated a denial of State Farm's motion. It is, therefore, requested that the trial court's ruling be overturned and the Pooles' claims be reinstated and remanded for trial.

II. ASSIGNMENTS OF ERROR

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

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in its interpretation of the insurance policy and determining that State Farm did not breach the terms of the policy.

(Assignment of Error No. 1)

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

(Assignment of Error No. 2)

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

(Assignment of Error No. 3)

IV. STATEMENT OF THE CASE

A. Procedural History

In October 2015, The Pooles filed a lawsuit against State Farm alleging claims for breach of contract, bad faith claim practices and violations of the Consumer Protection Act for State Farm's refusal to pay extended limits pursuant to a homeowner's insurance policy. CP 1-7. In February 2017, the trial court granted State Farm's motion for summary judgment on all of the Pooles' claims. CP 491-492. The granting of summary judgment was in error.

B. Facts

Michael and Vicky Poole own and reside on property located at 21 Three Devils Road, Malott, Washington. The property included a barn and a home, built in 2006. Attached to the home was a large workshop. Mr. Poole utilized the shop for machine tooling pursuant to contracts, including government contracts. (Mr. Poole also earned money working at local farms.) Mrs. Poole was also self employed selling horse tack, from which she operated from a mobile trailer. CP 272-73.

In many ways, the Poole's owned and lived on their dream property. Their home/shop and barn was nestled in an open area of a large beautiful forest, of which they owned 160 acres. CP 273, 278-80. The home/shop was approximately 5,300 square feet including approximately 1,000 square feet of living space, with the remainder for a large open area shop and storage. CP 351-354. The living space was two stories and

included a large kitchen, living area, and bathroom downstairs with a master bedroom upstairs. CP 273, 281-92.

The Pooles purchased a homeowner's insurance policy from State Farm, Policy Number 47-GW-2878-3, to provide protection from losses that may result from accidental damage to the their home/shop, barn, and personal property contained in the home. CP 273. The Policy, a replacement cost policy, had limits of \$230,748 for the home/shop (the "dwelling") and \$52,823 for the barn (a "dwelling extension"). Id. In addition, the Policy included what is referred to as "Option ID" extensions for both the dwelling and dwelling extension, in the amounts of \$46,149.60 and \$4,614.96, respectively. CP 136-51, 273, 222, 224-46. The Option ID extensions provide extended limits of liability in case the policyholder incurred more than the limits of liability in rebuilding/repair the property. CP 333, 347, 366-367.

In the summer of 2014, a wildfire caused by lightening spread through the area in which the Pooles lived, damaging tens of thousands of acres of land and forest and over 300 homes. CP 327. Unfortunately, on July 17, 2014, the Pooles' land, home/shop, and barn were destroyed by the wildfire.¹ CP 274, 293-300. Consistent with the terms of the Policy, the Pooles timely notified State Farm of the loss and claim. CP 273. The loss to the home/shop was covered as a "dwelling" under the property and the loss to the barn was covered as a "dwelling extension." CP 327.

¹ There is no dispute that the buildings on the Poole property were each a total loss.

State Farm investigated the loss to the Poole property and determined that the actual cash value of the damages, for both the dwelling (house/shop) and the dwelling extension (barn), exceeded or met close to the limits of the policy, \$230,748 and \$52,823, respectively.² In approximately September 2014, State Farm paid the Pooles the actual cash value of \$230,126.71 for the home/shop. CP 329, 349, 391-459.

Throughout the administration of the claim, and until recently, State Farm represented to the Pooles that the replacement cost for the home/shop was \$247,894.59 – inexplicably claiming items were “paid when incurred” or “PWI.” However, it is clear from reviewing the State Farm estimates that the listed PWIs were for items such as insulation, roofing, roof trusses, and carpet. There was absolutely no justification for excluding these items from the replacement cost value of the loss. State Farm, at deposition, ultimately conceded that the replacement cost value of the Poole pre-loss structure was \$302,317.73. CP 331-52.

The misrepresentation is important as the actual cash value paid to the Pooles, short of the policy limits, was based upon the misrepresented replacement cost value. Thus, State Farm wrongfully withheld approximately \$600 from the Pooles, *and*, until recently, took the position that the Pooles only had access to approximately \$17,000 of an extension limit should the extension apply.

² Replacement Cost Value is the actual current costs to repair or replace damaged property. Actual Case Value is the depreciated value of Replacement Cost, based upon factors such as wear and tear, condition, and age.

As the costs to rebuild the home/shop exceeded the limits of the Policy, if the Pooles rebuilt the home/shop, the Option ID – Increased Dwelling Limit should be triggered, providing the Pooles an additional \$46,149.60 towards the rebuild. CP 367-68. The Pooles purchased this specific optional coverage. CP 365-66. The \$46,149.60 is the full extent of the limit mandated under the Policy. CP 334-35. Finally admitting that State Farm’s own estimate of replacement cost is \$320,317.73, State Farm conceded that \$46,149.60 is potentially available under the Option ID. CP 387.

The Pooles investigated rebuilding their home/shop. They obtained an estimate of \$486,667 to rebuild the home/shop at it was configured at the time of the loss. CP 274, 302-04, 353-55. The Pooles discovered that they could actually save money in rebuilding if they separated the shop from the home. They entered into a contract to rebuild the shop for \$154,346 and a contract to rebuild the home for \$183,848. CP 274-75, 306-14, 356-57. The aggregate of the contacts for the rebuild for the separate shop and home was \$338,194, a savings of \$148,473 over the estimate to rebuild the structures combined.³ CP 275.

The Policy provision regarding the extended limits for the Dwelling reads as follows:

Option ID – Increased Dwelling Limit. We will settle losses to damaged building structures *covered*

³ As is made clear from State Farm’s estimates to rebuild the home/shop and the estimate obtained by the Pooles, the Pooles were grossly under insured on their property. The Pooles were looking for ways to be able to afford to rebuild what they lost in the wildfire. CP 275.

under **Coverage A – DWELLING** according to the **SECTION I – LOSS SETTLEMENT** provision shown in the **Declarations**.

If the amount you actually and necessarily spend to repair or replace damaged building structures exceeds the applicable limit of liability shown in the **Declarations**, we will pay the additional amounts not to exceed:

1. The Option ID limit of liability shown in the Declarations to repair or replace the Dwelling; or
2. 10% of the Option ID limit of liability to repair or replace building structures covered under **COVERAGE A – DWELLING, Dwelling Extensions**.

CP 150, 245 (Italicized emphasis added).

Coverage A – Dwelling, under Section I – Loss Settlement, of the Policy reads, in relevant part as follows:

Dwelling. We cover the dwelling used principally as a private residence on the **residence premises** shown in the **Declarations**.

Dwelling includes:

- a. structures attached to the dwelling
- . . .

CP 139, 234.

As the shop was attached to the residence at the time of the loss, it is considered a part of the dwelling at the time of the loss and covered under the Policy as a dwelling. CP 361-62. The Pooles submitted the contracts for the shop and home to State Farm and requested payment of

the Option ID Dwelling limits extension. CP 275. A binding contract is viewed by State Farm as sufficient to satisfy the “incurred” requirement of the Option ID – Increased Dwelling Limit. CP 374-75. Thus, the contracts for the rebuild of the shop and the home should have triggered the Option ID extension.

The new home and new shop were built approximately 35 feet apart. The aggregate square footage of the new home and new shop are significantly less than the pre-loss home/shop. The new home is approximately 1,900 square feet while the new shop is 2,160 square feet, for a total of 4,060 square feet.⁴ CP 275, 316-19, 357. The pre-loss home/shop was over 5,300 square feet. While the Pooles traded shop space for living space, they also significantly reduced the size of the shop.⁵ CP 275.

State Farm denied the Pooles’ request for Option ID Dwelling limits extension, stating that the costs of rebuilding the shop were not covered by the Policy as it was rebuilt as a separate building. CP 276, 358, 361-63, 376. Through telephone conversations and written correspondence, State Farm asserted that the separate shop was not

⁴ The fact that the Poole’s built a larger house with a smaller shop should not effect the Option ID extension as it was, and is, known that State Farm’s own estimate to rebuild the pre-loss structure is \$302,317.73. With the limit of the policy at \$230,748, rebuilding their structures to their previous dimensions trigger the entire limit extension. The Pooles are responsible for all costs incurred beyond the limits and extensions.

⁵ State Farm, in its Motion for Summary Judgment, implied that the Pooles significantly upgraded their buildings, including increasing the square footage and adding heated floors. In truth, the Pooles sacrificed overall square footage from the pre-loss home shop. The heated floors exist only in the small bathroom in the home, and were of a minimal cost to install during construction.

present prior to the fire and, therefore, not a dwelling, or any covered property. CP 276, 378. State Farm alleged that the new building contracts do not reflect the property that was actually replaced - that the shop was not similar construction to what was insured, as it was not like in kind and quality to the insured structure. CP 222, 248-71.

However, State Farm concedes that a policyholder may rebuild a structure with a different floor plan, different materials, different stories/levels and still be considered similar construction. CP 369-70. Further, State Farm concedes that the house and the shop serve the same functions before the fire as after, and that they are built with the same materials as the pre-loss structure. CP 370-71.

State Farm concedes that if the new shop and home shared a wall, foundation, or even just a roof line, they would be considered one building and the Option ID extension would be paid.⁶ CP 276, 359-60, 382-87.

State Farm representative also concedes that (1) the language of the Policy is “confusing” as to this issue; (2) the language of the Policy it is reasonably not likely to be understood by a policyholder; and (2) reasonable people could disagree regarding State Farm’s interpretation. CP 379-81.

State Farm also concedes that the language of the Policy does not specifically dictate separation of a building cannot occur upon rebuilding. CP 364. This particular claim was the first time that State Farm was ever

⁶ State Farm does not even know if the original shop/house had the shop and the house built on one foundation or two separate foundations. CP 372-73.

asked to address circumstances in which a covered building was rebuilt into two separate structures and the first time that the Option ID Policy language was interpreted as it was against the Pooles. CP 376-77.

State Farm wrongfully stated that there were no issues with payments for the damage to the Pooles' barn. In fact, a similar limits extension existed for the barn. The barn was considered a dwelling extension as a separate structure (other than a dwelling) on the property at the time of the loss. The policy limits for the dwelling extension was \$52,823.00. CP 334, 461. An Option ID Dwelling Extension was purchased by the Pooles, extending limits by an additional \$4,614.96. *Id.* State Farm paid the Pooles \$52,710.02 as actual cash value of the damage to the barn. CP 328-30, 391-459.

While the Pooles entered into a contract to rebuild the barn for \$47,000, the Pooles actually incurred a total of \$66,628.07 in total costs. The Pooles presented the invoices to support these costs to State Farm. State Farm failed to pay the Option ID Dwelling Extension in the amount of \$4,614.96 plus the remainder of \$112.98 of policy limits. CP 277-78.

V. ARGUMENT

An appellate court reviews 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 had the initial burden of presenting evidence that there was 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 breach of contract, bad faith and consumer protection claims. However, genuine issues of material facts existed relating to whether State Farm wrongfully applied the Option ID language of the Policy, whether State Farm's interpretation of the Policy was unreasonable and untenable, and whether

State Farm violated multiple provisions of the Washington Administration Code. Since there were genuine issues of material fact, State Farm was *not* entitled to summary judgment. The trial court's ruling should be overturned and the Poole's claim reinstated for trial.

A. State Farm Breached the Terms of The Policy By Refusing to Pay Option ID.

Interpretation of an insurance policy is a question of law. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007).

Because insurance policies are construed as contracts, the policy terms are interpreted according to contract principles. *Weyerhaeuser Co. v.*

Commercial Union Ins. Co., 142 Wn.2d 654, 665, 15 P.3d 115 (2000).

The policy is considered as a whole, and is given a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Id.* at 666; *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 427, 951 P.2d 250 (1998).

An insurance policy should be construed the way an average layman would interpret it. *Rodriguez v. Williams*, 107 Wn.2d 381, 384, 729 P.2d 627 (1986); *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 549 P.2d 9 (1976). As stated in *Dairyland Ins. Co. v. Ward*, 83 Wn.2d 353, 358, 517 P.2d 966 (1974), "[t]he language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man, rather than in a technical sense." *See also Kowal v. Grange Ins. Asso.*, 110 Wn.2d 239, 246, 751 P.2d 306 (1988).

If the language of a Policy is clear, the court must enforce the policy as written and may not create ambiguity where none exists. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). A clause is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable. *Am. Nat'l Fire Ins. Co.*, 134 Wn.2d at 428; *Morgan v. Prudential Ins. Co.*, 86 Wn.2d 432, 435, 545 P.2d 1193 (1976). Any ambiguities are resolved against the drafter-insurer and in favor of the insured. *Am. Nat'l Fire Ins. Co.*, 134 Wn.2d at 428; *Queen City Farms c. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 68 (1994); *American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 878, 854 P.2d 622 (1993).

1. Option ID Coverage Does Not State A Damaged Structure Cannot be Rebuilt as Two.

The primary issue here is whether the Option ID Dwelling Extension covers the costs of rebuilding a structure that was considered a dwelling in its entirety at the time of the loss, but thereafter rebuilt as a separate structure from the home. An illustrative example would be a policyholder rebuilding a home which contained an attached three car garage at the time of the loss, but rebuilds with the three car garage as a structure detached from the house.

The Court's interpretation of the Option ID must be as fair, reasonable and sensible as would be given to the contract by the average person purchasing insurance, and *not* in a technical sense. In that light, it

is readily clear that the Option ID would, in fact, apply to a structure built separately from the home if it was attached to and a part of the home at the time of the loss.

The Policy defines a dwelling *at the time of a loss* to be a structure used as a private residence *and* any structure attached thereto. Thus, any reasonable purchaser of insurance would interpret the coverage to pay to rebuild all that was defined as a dwelling *at the time of loss*, even if it was thereafter rebuilt as separate structures. The Pooles' shop was considered a dwelling at the time of the loss and State Farm is responsible to pay for it. The fact that it was rebuilt separately after the loss should not redefine the shop as something other than what it was at the time of the loss, a dwelling. Any reasonable purchaser of insurance would interpret that language of the Option ID would cover everything that was considered a dwelling *at the time of the loss, regardless how it was rebuilt including two separate structures.*

The amount of the Option ID coverage, \$46,149.60, is an amount that State Farm expected to pay if the structure was rebuilt to pre-loss status. This is not disputed. The replacement cost estimate by State Farm was \$302,317.73. The limits of the Policy, less \$600, were paid as the actual cash value of the home/shop. The Pooles are not attempting to get access to monies that the Policy or State Farm did not anticipate paying upon replacement of the building.

Analysis of the specific policy language appears to be an issue of first impression, as there are no appellate cases located interpreting Option

ID or similar Policy limits extension language in light of separating a covered building into two buildings. This was also a matter of first impression for State Farm's decision makers.

However, the appellate courts have examined application of policy interpretation and the understanding of a reasonable purchaser of insurance. In *Starzewski v. Unigard Ins. Grp.*, 61 Wn. App. 267, 810 P.2d 58 (1991), the Court was asked to interpret the replacement cost provision of an insurance policy that stated that as replacement cost, the insurance company was responsible for "the amount necessary to repair or replace the damaged property." Specifically, the insured argued that such language included any costs for upgrades mandated by the current local building codes. The Court of Appeals ruled that, as a matter of law, the average person would believe that "the amount necessary to repair or replace the damaged property" includes the amount necessary to comply with mandatory building codes enacted after the policy was issued. *Id.* at 274.

Similarly, in the instant matter, a reasonable purchaser of insurance would interpret the Option ID provision, which extended policy limits for incurred expenses to repair or replace a structure attached to the dwelling at the time of the loss, to continue to extend to such expenses - even if that structure were rebuilt several feet away from the living structure after the loss. Certainly, a reasonable homeowner would interpret this language as covering a three-car garage, that was attached pre-loss, which is rebuilt as a detached garage. Argument otherwise is simply nonsensical. The fact

that State Farm concedes that if the two structures shared a wall, foundation, *or* a roof line, the issue here would be avoided. Requiring such stipulations while the cost to replace remains the same further emphasizes the nonsensical nature of State Farm's position.

It is counter-intuitive (and overly technical) to argue that a policyholder cannot separate a structure that was attached to a dwelling pre-loss and maintain coverage for that structure. Accordingly, the Court should interpret the plain language of the Option ID and the Policy as covering those structures that were defined as a "dwelling" at the time of loss, even if a part is later rebuilt as structure separate from the rebuilt home. The Pooles assert that State Farm's interpretation of the Policy is unreasonable and narrow while only self service to State Farm.

If the Court should find State Farm's analysis to be a reasonable interpretation, then, at best, the Policy language is ambiguous on this issue. Even State Farm's representative agreed that the language of the Policy is confusing to the policyholder. Beyond just confusing, the language is ambiguous if it is supposed to mean that a structure attached to a dwelling at the time of the loss (therefore covered as a dwelling under the Policy) cannot be rebuilt as a separate structure *and* be subject to the Option ID Dwelling Extension. The plain language of the Policy obviously does not say that. To reach that conclusion, one has to re-categorize or redefine a structure from its pre-loss status as a dwelling based upon circumstances that occur after the loss. There is no clear basis or support in the Policy to re-categorize or redefine a structure post-loss

from its pre-loss status, especially when it retains the original use and is similarly constructed.

Not only does State Farm's representative agree that the Policy language is confusing, but he also agrees that reasonable people could validly disagree with State Farm's interpretation. Such is a clear admission from State Farm that the Policy is ambiguous on this issue.

If the Option ID provision is not intended to cover a structure connected to a residence at the time of a loss (and therefore a dwelling) that is rebuilt separately from the residence, the text of the Option ID provision is ambiguous, at best. As such, the Option ID must be interpreted in favor of the Pooles and against State Farm, the drafter of the language. The Option ID should be found to cover the shop built by the Pooles 35 feet away from the residence, as it was attached at the time of the loss and is, therefore, part of the a dwelling.

Before the fire, the Pooles had a home/shop consisting of 5,300 square feet total (900 square feet of living space and the remainder given over to the shop and storage). The Pooles replaced the structure with a shop and home consisting of a total of 4,000 square feet (1900 living and 2100 shop). The pre-loss structure, a much larger structure, was for a shop and home. The post-loss structures is also for a home and shop, although the living space is larger, the shop space is about half the size as before, and they are separated by 35 feet as opposed to zero. They are made up of the same materials as the pre-loss structure. The post-loss structures are of

similar construction to the pre-loss combined structure, and they are used for the same purposes.

The post-loss rebuilds are of a similar likeness and resemblance to the pre-loss structure, “especially in a general way.” It is readily clear that the post-loss rebuilds and the pre-loss structure are of similar construction. They are just simply separated.

The Court should interpret the Option ID language and the Policy as it plainly reads – a structure that was attached to a residence at the time of loss is a dwelling, and its rebuild is covered by the Policy and the Option ID Dwelling limit extension. There is nothing in the language that requires the structure to be rebuilt as one. The Court should also find that the post-loss structures rebuilt by the Pooles to be of similar construction to the pre-loss home/shop. At a minimum, there is a material issue of fact as to whether the post-loss shop should still be considered a dwelling and whether then post-loss rebuild are of similar construction to the pre-loss home/shop.

2. The Policy Anticipates Coverage of Other Buildings

Section I.1.a and b can logically be read to say that a "dwelling" includes "structures attached to the dwelling" or "other structures on the resident premises.”

Here is the relevant text concerning what is covered under the Policy:

“Section I – Coverages”

1. Dwelling. We cover the dwelling used principally as a private residence on the **residence premises** shown in the **Declarations**.

Dwelling includes:

- a. structures attached to the dwelling
- b. Material and supplies located on or adjacent to the **resident premises** for use in the construction, alteration, or repair of the dwelling or other structures on the **resident premises**;

State Farm apparently interprets subsection 1.b. to mean that "dwelling" includes "material and supplies located on or adjacent to the resident premises for use in the construction, alteration, or repair of the dwelling" and "material and supplies located on or adjacent to the resident premises for use in the construction, alteration, or repair of" "other structures on the resident premises." The text does not so specify. It does not say that, with respect to "other structures on the resident premises," coverage is limited to "material and supplies for use in [their] construction, alteration, or repair." State Farm's interpretation requires reading the words, "material and supplies located on or adjacent to the resident premises for use in the construction, alteration, or repair of" into the text immediately before the words, "other structures."

It is reasonable to read the introductory words, "Dwelling includes" in conjunction with the text of subsection 1.b to say that "dwelling includes" "material and supplies located on or adjacent to the

resident premises for use in the construction, alteration, or repair of the dwelling," as well as "other structures on the resident premises."

State Farm's interpretation of the text is not logical. "Material and supplies located on or adjacent to the resident premises for use in the construction, alteration, or repair of the dwelling" is covered under subsection 1—"dwelling," because the "dwelling" itself is covered under subsection 1. It does not make sense why "material and supplies located on or adjacent to the resident premises for use in the construction, alteration, or repair of" "other structures on the resident premises" would be covered, if these "other structures" are not also covered under subsection 1—"dwelling."

Moreover, since the "Declarations" in this case include the workshop, it is reasonable to conclude that an area dedicated to that use on the resident premises would be included under the coverage for "dwelling."

Before the fire, the combined shop/home structure was undisputedly considered the Pooles' "dwelling." This was the case despite the fact that the policy describes "dwelling" as a structure primarily used as a residence, and most of the space in the pre-loss building was used as a workshop. Thus, it is reasonable to understand subsection 1.b. as meaning "dwelling includes" "other structures on the resident premises" that are dedicated to the same use that most of the space in the pre-loss "dwelling" was dedicated. This would seem to be the most correct reading of the language. At best it is susceptible to two different, reasonable

interpretations and is, therefore, ambiguous. For that reason, the court must construe it in favor of the Pooles. See *American Nat'l Fire Ins. Co.*, 134 Wn.2d at 428, citing *American Star Ins. Co.*, 121 Wn. 2d at 878 (where the insurance policy exclusion is ambiguous and in absence of evidence showing an understanding that coverage was intended to be excluded, policy is construed to provide coverage).

Reading section 1.b. as saying, “dwelling includes” “other structures,” is harmonious with other language in the policy. This is particularly so in this case, as the shop, or work area, is part of the primary residence, or resident premises --as it is so defined in the Declarations.

The policy goes on to say in subsection two under “Dwelling extension,” “We do not cover other structures” [that are] “not permanently attached to or otherwise forming a part of the realty.” Section I.2. This text is not correctly read as saying, “not permanently attached” to the *dwelling*, or “not permanently attached” to the *home*.⁷ Rather, the text says, “not permanently attached “to the *realty*.” “Realty” is not defined in the policy as “dwelling” or “home.” Its common meaning is simply, “real estate.” Thus, Section I.2. says that State Farm does not cover under “dwelling extension” buildings that are not attached to the insured’s real estate. This makes sense. If the text of I.2.a is correctly read as saying State Farm does not cover under dwelling extension “other structures” that

⁷ State Farm claims “the policy ... expressly excludes unattached structures from the definition of ‘dwelling.’” Reply, 5. That is not accurate.

are “not permanently attached” to the *dwelling* or *home*, then it directly contradicts the introductory language in section I.2 stating that State Farm “cover[s] other structures on the residence premises separated by clear space.” Section I.2. Furthermore, even if section I.2.a could be correctly read as saying State Farm does not cover structures that are not attached to the dwelling, viewed in combination with the language under section I.1, “Dwelling,” section 2a could be understood to mean that any unattached structure associated with the primary residence or resident premises is not considered a “dwelling extension”; rather, it is part of the “dwelling” and covered under that section..

While the policy language also says that “other structures” “used in whole or part for business purposes” are not covered under “dwelling extension,” that does not necessarily mean that an area used for work would not be covered as part of a “dwelling” or “dwelling extension.” Many people work from home or in a dedicated space on their property and consider the area part of their primary residence or resident premises. People commonly consider a separate structure where they work (or do something other than sleep and eat) located on their property to be part of their private or primary residence or resident premises—like an unattached garage, greenhouse, yoga hut, or art studio. The workshop does not have a separate address. It is less than 35 feet away from the structure for eating and sleeping—so close as to render the two a combined live/workspace.

The workshop is not used for “business purposes.” There is no sign to draw customers or foot traffic into the shop. In fact, customers or

clients do not visit the structure, and no commercial transactions are conducted there. The space, therefore, does not even meet the common definition of “business”—a place where commercial activity occurs. At the very least, the word “business” is ambiguous, and thus, it should not be interpreted to exclude coverage of the workshop. See *American. Nat'l Fire Ins. Co.*, 134 Wn.2d at 428, citing *American Star Ins. Co.*, 121 Wn. 2d at 878 (where the insurance policy exclusion is ambiguous and in absence of evidence showing an understanding that coverage was intended to be excluded, policy is construed to provide coverage).

Reading the text of section 1.b to say coverage for “dwelling” includes “other structures” is reasonable and in sync with other language in the policy. Section 2.a does not say that structures unattached to the dwelling or home are not covered, and even if it did, that does not mean unattached structures could not be covered under “dwelling.” Finally, the workshop is not excluded as a “business.” At the very least, the language in Section I--Coverages is ambiguous, and therefore must be interpreted in favor of the Pooles.

3. Other Contractual Breaches Before Litigation

At summary judgment, State Farm addressed the \$600 of “replacement cost” available to the Pooles if they had rebuilt the home and shop as one structure. This \$600 should have been paid as actual cash value, as the replacement cost value represented to the Pooles was a

material misrepresentation. Actual cash value is based upon depreciation from the replacement cost.⁸

Further, State Farm inexplicably failed to pay the balance of the policy limits for damages to the barn (\$112,98) *and* failed to pay the Option ID Dwelling Extension limits extension of \$4,614.96. The Pooles incurred a total of \$66,628.07 in costs to rebuild the barn, above the policy limit of \$52,823. These invoices were submitted to State Farm, and then ignored. The Option ID Dwelling Extension should be paid.

There are clear genuine issues of material fact as to whether State Farm has breached the terms of the insurance policy. Accordingly, State Farm's motion to dismiss the breach of contract claim should be denied.

B. IFCA Claims.

The Insurance Fair Conduct Act, in relevant part, states:

. . .

(2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages.

(3) The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award

⁸ The Policy mandates State Farm to pay the actual cash value of the property regardless of whether it is repaired or rebuilt. CP 144, 222, 239. It is clear from State Farm's estimate that State Farm calculated the actual cash value based upon depreciation from the replacement cost value. State Farm inexplicably did not include the "PWIs" in the replacement cost, and therefore calculation of the actual cash value.

reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

RCW 48.30.015. Further, in order to preserve an award under this statute, a policyholder must provide written notice to the insurance company and the Office of the Insurance Commissioner of the basis for claims against the insurance company. This notice must be provided at least twenty (20) days prior to filing a lawsuit. RCW 48.30.015(8)(a).

State Farm requested the trial court to deny any claims and remedies pursuant to IFCA based upon the assertion that Plaintiffs cannot establish an unreasonable denial of a claim. To the contrary, there was a denial of a claim, coverage under Option ID *and* there is evidence that State Farm's denial was unreasonable.

The failure to pay an amount requested by insured *is* a denial of coverage, and subject to the potential for IFCA damages if the denial was unreasonable. *Morella v. Safeco Ins. Co. of Illinois*, No. 12-0672-RSL, 2103 WL 1562032, at *3 (W.D. Wash. April 12, 2013); *Freeman v. State Farm Mut. Auto. Ins. Co.*, No. 11-761-RAJ, 2012 WL 2891167 at *3 (W.D. Wash., July 16, 2012).

State Farm's interpretation of the Policy and the denial of Option ID Dwelling limits extension was unreasonable and untenable, or at least there were genuine issues of material fact on this issue. Given State Farm's admission that interpretation of the Option ID as applied to rebuilding separate structures may be disagreed with by reasonable people,

State Farm is fully aware that the Policy is ambiguous. Thus, interpreting the known ambiguous language of the Policy in its own favor is unreasonable. In addition, State Farms' failure to properly calculate and pay the true actual cash value amount (based upon a misrepresentation of the replacement cost value) was unreasonable and untenable, and without any justification. The denial of the extension and the full actual cash value is a denial of coverage and subject to IFCA damages.

Further, there was no explanation for State Farm's failure to pay the remainder of the limits of the dwelling extension for the barn and then failure to pay the Option ID Dwelling Extension when the Pooles incurred more than policy limits to rebuild the barn.

The trial court's order fails to address State Farm's specific motion regarding IFCA claims, but rather just dismisses all of the Pooles claims generally. The Pooles did not outline an IFCA claim separately, but requested damages pursuant to IFCA. As such, State Farm's motion was itself inaccurate. However, to the extent that the Poole's requested damages pursuant to IFCA, such damages should be available upon remand.

C. 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, statutory duty of good faith and case law defining the duty of

good faith, and 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 Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 196 P.3d 664 (2008), 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).

Harm is also an element of an action for bad faith handling of an insurance claim. Where an insurance company has been found to have acted in bad faith, there is a rebuttable presumption of harm. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 389-91, 823 P.2d 499 (1992).

In the case at hand, 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 Pools interests. There is a clear and strong argument that State Farm's interpretation of the Policy and the Option ID Dwelling extension was unreasonable, frivolous, and unfounded. State Farm's position is counter-intuitive, as illustrated by the example of rebuilding a three car garage as a detached structure. Quite simply, it readily appears that State Farm was searching for an excuse to not pay any extension on the dwelling limits.

Further, even if the language of the Policy is deemed ambiguous, State Farm knowingly admits that the language is ambiguous. Knowing that the Policy language is ambiguous, State Farm chose to disregard the

interests of the Pooles and solely protect its own financial interests. This falls squarely within the definition of bad faith.

In addition, State Farm's continual misrepresentation of the replacement cost value of the house is without valid excuse. At deposition, State Farm conceded that *its own estimate* was that the replacement cost value of the home/shop was \$302,317.73, although State Farm consistently represented to the Poole's during the claim administration that the replacement cost value was \$247,894.59. This misrepresentation resulted in an incorrect calculation of the actual cash, \$600 under policy limits. However, the misrepresentation not only cost the Pooles' \$600 in receipt of actual cash value money, but State Farm took the position that only approximately \$17,000 would have been available to the Pooles under the dwelling limit extension.

Finally, State Farm's failure to pay the balance of the policy limits for the barn and the Option ID Dwelling Extension for the costs to rebuild the barn exceeding the limits of the policy is without reason or excuse. State Farm's failure is bad faith.

Harm in this case is clear. State Farm has refused to pay the Pooles for monies as required by the Policy, \$46,149.60 in Option ID Dwelling limits extension and \$600 in actual cash value in policy limits. State Farm has also failed to pay the balance of the limits for the barn, \$112.98, and the Option ID Dwelling Extension limits extension in the amount of \$4,614.96.

At a minimum, there is a material issue of fact as to whether State Farm acted reasonably in its application of the dwelling limit extension (or failure to apply), in representing the replacement cost value of the home/shop, and failure to pay limits extension for the rebuild of the barn. Therefore, the Court should reverse the trial court's ruling, reinstate the Pooles' claim, and remand for trial.

D. 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. Further, RCW 19.86.090 provides for an award of attorneys fees and an award of three times actual damages, not to exceed \$25,000, for a violation of RCW 19.86.020.

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 also constitutes 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). 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 administrating 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).

Insurance is a business which has been declared by the legislature to be one affected by the public interest. RCW 48.01.030. As an industry extensively regulated and supervised by an elected public official, the

manner in which insurance companies interpret policies and adjust claims is a matter of public interest. *Salois v. Mut. of Omaha Ins. Co.*, 90 Wash. 2d 355, 361, 581 P.2d 1349 (1978).

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

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

Considering all of the evidence available in a light most favorable to the Plaintiff, the Plaintiff has 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.

Genuine material issues of fact exist regarding whether State Farm has violated the Consumer Protection Act. Therefore, the Court should deny State Farm's motion to dismiss these claims.

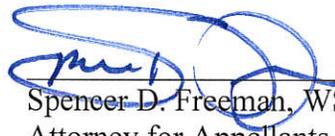
The trial court erred in granting summary judgment in favor of State Farm.

VI. CONCLUSION

Contrary to State Farm's position, and the trial court's ruling, the State Farm Policy's Option ID provision is triggered even though a covered home/shop was rebuilt as two separate structures. State Farm has breached the terms of the Policy. In doing so, State Farm failed in its duty to act in good faith and violated provisions of the Washington Administrative Code.

The trial court's summary judgment should be reversed, and the Pooles' claims should be reinstated and remanded for trial.

DATED this 30th day of November, 2017.



Spencer D. Freeman, WSBA #25069
Attorney for Appellants

FILED
COURT OF APPEALS
DIVISION II
2017 NOV 30 PM 2:15
STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL POOLE and VICKY POOLE, each
individually and the marital community
comprised thereof,

Respondent,

vs.

STATE FARM FIRE AND CASUALTY
COMPANY, a foreign insurance company,

Appellant.

Case No.: 50140-6-II

CERTIFICATE OF SERVICE

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 November 30, 2017 at approximately 2:00pm, 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

CERTIFICATE OF SERVICE - 1

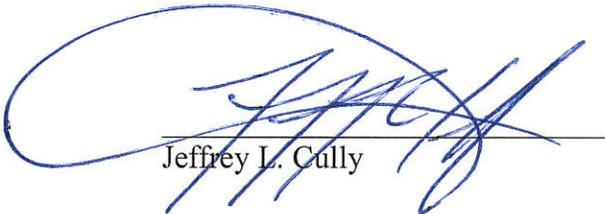
ORIGINAL

FREEMAN LAW FIRM, INC.
1107 ½ Tacoma Avenue South
Tacoma, WA 98042
(253) 383-4500 - (253) 383-4501 (fax)

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

Signed this 30th Day of November, 2017, at Tacoma, Washington.



Jeffrey L. Cully

FILED
COURT OF APPEALS
DIVISION II
2017 NOV 30 PM 2:15
STATE OF WASHINGTON
BY _____
DEPUTY

PIERCE COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

MICHAEL POOLE and VICKY POOLE, each
individually and the marital community
comprised thereof,

Case No.: 15-2-12947-9

DECLARATION OF MAILING

Plaintiffs,

vs.

STATE FARM FIRE AND CASUALTY
COMPANY, a foreign insurance company,

Defendant.

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

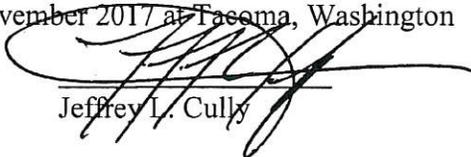
1. I deposited in the mails of the United States Postal Service (USPS) a properly
stamped and addressed package, postage prepaid, addressed to:

A. Gregory S. Worden, Laura H. Young, Lewis Brisbois Bisgaard & Smith,
1111 Third Avenue, Suite 2700, Seattle, WA 98101

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

- Appeal Brief
- Certification of Service to Court Appeals Division II
- Declaration of Mailing

EXECUTED this 30th day of November 2017 at Tacoma, Washington


Jeffrey L. Cully

DECLARATION OF MAILING - 1

FREEMAN LAW FIRM, INC.
1107 ½ Tacoma Avenue South
Tacoma, WA 98042
(253) 383-4500 - (253) 383-4501 (fax)

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