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**I. INTRODUCTION AND REVIEW OF MATERIAL FACTS.**

State Farm asks the Court to discount the key fact of the Pooles' claim: at the time of the fire, the shop was attached to the residence and itself defined as a dwelling. Thus, the shop was a covered structure at the time of the loss. Any reasonable person, and purchaser of insurance, would interpret the Policy to mean that all components of that covered dwelling would be covered, regardless of whether separated from each other, upon reconstruction.

It was clear and undisputed that rebuilding the Pooles' pre-loss structure would exceed the Policy limits and trigger the Option ID coverage. State Farm admitted replacement cost value of the covered building to be \$302,317.73. CP 387. The Pooles obtained rebuilding estimates for the structure in the amount of \$486,667. CP 274, 302-04, 353-55. The Policy limits were \$230,748. The Option ID coverage provided \$46,149.60 in addition to the Policy limits if actual incurred costs to rebuild exceeded the limits. CP 367-68.

If the Pooles had rebuilt the structure as it was, there is no question State Farm would have been required to pay the Option ID coverage. Further, State Farm admitted that had the Pooles connected the rebuilt shop and the rebuilt residence in any way (shared wall, shared roof line, or a breezeway), the Option ID coverage would have been paid.

The Pooles determined that it was significantly less expensive to build the shop detached from the residence. (Apart, the residence was \$183,848 and the shop was 154,346, significantly less combined than the \$486,667 estimate for rebuilding the two together.) CP 274-75, 306-14, 356-57. The structures collectively are similar in construction (materials

and style), actual purpose and use, and collectively smaller. The *only* material distinction in this case is that the shop and residence no longer shared a wall.

To be clear, the aggregate square footage of the new shop and residence is 4060 square feet, less than the pre-loss structure. While the house was increased from about 1,000 square feet to 1,900 square feet, the shop was significantly reduced from 4,000 square feet to 2,160 square feet. CP 275, 316-19, 357. The aggregate was actually *reduced* from the pre-loss structure, which was 5,300 square feet. CP 351-54.

State Farm continually attempts to paint the Pooles in a bad light, implying that they are attempting to wrongfully better their lives by obtaining improper insurance proceeds. To assist with this wrongful portrait, State Farm misrepresents the aggregate size of the shop and residence rebuilt after the loss. State Farm claims that the shop is 5,360 square feet. It is not. State Farm includes 3,200 square feet of outdoor space, meaning a cement pad and a minimal roof overhang with no building foundation, no walls, and no enclosure whatsoever. The rebuilt shop is 2,160 square feet. The aggregate rebuilt space, between the shop and residence, is 4,060 square feet, less than the destroyed building.<sup>1</sup>

State Farm continually references the fact that the Pooles increased the sizing of their living space, while ignoring the significant decrease to the size of the shop. The increase of the living space is of no consequence to the issue at hand, and State Farm does not present any legal argument that it is of consequence. The Pooles are well within their right to spend their money to increase their space in size or quality – and still have access

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<sup>1</sup> Even if the outside space to the new shop were included, the overall space between the pre-loss structures and rebuilt structures would be essentially the same.

the full insurance benefits as long as the cost to rebuild the pre-loss structure is known to trigger the benefits. It was. State Farm does not even attempt to argue otherwise.

The only fact that is meaningful in the instant case is that the rebuilt shop and the rebuilt residence no longer share a wall.

## II. ARGUMENT

### A. THE POLICY MUST BE INTERPRETED TO TRIGGER OPTION ID EVEN THOUGH SHOP WAS REBUILT A DETACHED STRUCTURE.

There is no dispute and it is absolutely clear that, at the time of the loss, the shop was defined as a dwelling and covered by the Policy as a dwelling. This fact should end the inquiry as to whether the costs to rebuild the shop should be calculated in the amount to rebuild the dwelling, regardless of whether it is rebuilt as a stand alone structure.

If a structure is covered at the time of the loss, it should be calculated as part of reconstruction costs to determine coverage extensions. State Farm has cited no case law which supports contractual interpretation any other way, because there is none.

State Farm cites *Allemand v. State Farm Ins. Cos.*, 160 Wn.App. 365, 248 P.3d 111 (2011) for analysis of “similar construction.” There, the issue was whether the Policy provided coverage for code upgrades required by the local codes. *Id.* at 366-67. The Court looked to the language of the Policy to determine such coverage, which stated that the Policy covered “similar construction.” *Id.* at 372.

The *Allemand* Court found that “similar construction” is the same as “like construction” and “equivalent construction.” *Id.* at 373. Such language is equivalent to “like kind and quality.” *Id.* at 371.<sup>2</sup>

*Allemand* supports the Pooles interpretation of the Policy. The issue is whether the rebuilt shop and residence are similar, or of like kind and quality, to the pre-loss destroyed structure. State Farm does not argue that the building materials or building style are not of like kind and quality to the pre-loss structure. They are. The *only* issue is that the shop and the residence are no longer connected.

State Farm, ignoring *Allemand*'s affirmation that “similar construction” means “like kind and quality,” asserts dictionary definitions of “similar,” being “looking or being almost the same, although not exactly,” and “having a likeness or resemblance, especially in a *general way*” Respondent’s Brief, p. 22 (emphasis added). However, even by the dictionary definitions, the rebuilt shop and residence clearly qualify as “similar construction.”

The shop and residence are built with similar materials and style to the destroyed structure. The new structures have the same functions as the pre-loss structure. The only difference is that they are now separated by 35 feet. They most certainly have a likeness and resemblance to the destroyed covered structure, especially when considered in a *general way*. The “like kind and quality” and “similar” between the pre-loss structure and the new shop and residence is especially clear when State Farm has admitted that if the shop and residence shared a wall, shared a roof line, or

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<sup>2</sup> The Court concluded that “similar construction,” or “like kind and quality,” did not include code upgrades.

even a breezeway attaching the two buildings would trigger the Option ID. CP 276, 359-60, 382-87.

The separation of the shop from the house simply does not render the new shop and residence to be dissimilar from the pre-loss destroyed structure. The previously referenced analogy stands: if a policyholder, with Option ID coverage, owned a residence with a three car garage destroyed by fire, and the policy holder decided to rebuild the garage as a separate structure, it is seems axiomatic that the costs to build the detached garage would be included in determining whether construction costs exceeded policy limits. State Farm's analysis would result in the exclusion of the detached garage, which is an obviously ridiculous result. A policy should be given a practical and reasonable interpretation rather than a literal interpretation or strained interpretation which leads to an absurd conclusion. *Morgan v. Prudential Ins. Co.*, 86 Wn.2d 432, 435, 545 P.2d 1193 (1976).

State Farm's interpretation of the Policy is overly technical, too literal, and leads to an absurd conclusion. The shop was covered as a dwelling at the time of the loss. The rebuilt shop and residence are clearly similar construction. The cost to rebuild the shop should be inclusive of calculating costs to rebuild for purposes of application of the Option ID.

**B. IF OPTION ID CAN BE INTERPRETED AS NOT COVERING THE SEPARATELY REBUILT SHOP, THE POLICY LANGUAGE IS AMBIGUOUS AND MUST BE INTERPRETED IN FAVOR OF THE POOLES.**

The rules of interpretation of an insurance policy have been long set in this case, as stated in *Morgan v. Prudential Ins. Co.*, 86 Wash. 2d 432, 545 P.2d 1193 (1976):

A contract of insurance should be given a fair, reasonable, and sensible construction, consonant with the apparent object and intent of the parties, a construction such as would be given the contract by the average man purchasing insurance. *Ames v. Baker*, 68 Wn.2d 713, 415 P.2d 74 (1966). The contract should be given a practical and reasonable rather than a literal interpretation; it should not be given a strained or forced construction which would lead to an extension or restriction of the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion, or render the policy nonsensical or ineffective. *Philadelphia Fire & Marine Ins. Co. v. Grandview*, 42 Wn.2d 357, 255 P.2d 540 (1953); 44 C.J.S. *Insurance* § 296 (1945).

The pertinent rules are simple enough. If the policy language is clear and unambiguous, the court may not modify the contract or create an ambiguity where none exists. *Tucker v. Bankers Life & Cas. Co.*, 67 Wn.2d 60, 406 P.2d 628, 23 A.L.R.3d 1098 (1965). However, where the clause in the policy is ambiguous, a meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning. *Glen Falls Ins. Co. v. Vietzke*, 82 Wn.2d 122, 508 P.2d 608 (1973); *Thompson v. Ezzell*, 61 Wn.2d 685, 379 P.2d 983 (1963). A policy provision is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable. *Washington Restaurant Corp. v. General Ins. Co. of America*, 64 Wn.2d 150, 390 P.2d 970 (1964); *Selective Logging Co. v. General Cas. Co. of America*, 49 Wn.2d 347, 301 P.2d 535 (1956).

*Id.* at 434-35.

To the extent that State Farm's interpretation of the policy is reasonable (it is not), the Policy language on whether the Option ID covers a structure originally attached to the residence rebuilt as a separate structure can be reasonably interpreted in two ways. State Farm glosses over this issue, merely alleging that the Pooles' interpretation is not reasonable.

State Farm is clearly wrong that the Pooles' interpretation is unreasonable. A reasonable person would interpret the fact that a part of a

structure defined as a dwelling at the time of the loss would be included in costs of reconstruction even if rebuilt separately from the residence. State Farm's position ignores the testimony of their own representative, Dave Duray, a senior adjuster, who testified at deposition that the language of the Policy was confusing as to this issue, was not reasonably likely to be understood by a policyholder, and reasonable people could disagree with State Farm's interpretation of whether the Option ID applied in the Poole's claim. CP 379-81.

Mr. Duray's testimony is meaningful as it relates to whether the Policy language is ambiguous, as he admits that it is. State Farm ignores such testimony in order to sustain argument that the Policy language is not ambiguous. An experienced insurance adjuster's admission that the Policy language is not clear and susceptible to two reasonable interpretations is concrete unequivocal evidence that the Policy is ambiguous.

Further, even beyond Mr. Duray's testimony, it is clear that the Pooles' interpretation of the application of the Option ID to include construction costs of the shop, even though built as a separate structure, is reasonable. To find otherwise is to ignore common sense and a practical application of the Policy.

If State Farm's interpretation of the Policy is deemed reasonable, then the Policy is ambiguous regarding whether the Option ID coverage would include construction costs of a structure deemed a dwelling at the time of the loss but rebuilt separate from the residence.

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**C. BAD FAITH AND CPA CLAIMS SHOULD BE REINSTATED**

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).

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).

A major premise of State Farm's opposition to reinstating the bad faith claims is the assertion that State Farm's denial of Option ID coverage was correct. Such denial was, however, incorrect, and reinstating the Poole's breach of contract claim on the basis of this denial should result in the instatement of the bad faith and CPA claims.

A determination that State Farm's interpretation was incorrect based upon an unambiguous interpretation of the statute would establish that State Farm clearly breached a duty owed to the Pooles. A trier of fact

should determine whether State Farm's position was unreasonable or untenable.

A determination that the Policy was ambiguous on the issue of application of Option ID if a policyholder rebuilds a covered structure as two structures requires that the Policy be interpreted in favor of the Pooles, and the Option ID coverage applicable to the reconstruction of the shop. In light of the fact that it is well settled law that ambiguous policy language be interpreted in favor of the policyholder *and* that State Farm's own senior adjuster conceded that the language is ambiguous, there is a serious question as to whether State Farm reasonably denied the Option ID. Such a determination should be reserved for a trier of fact as an issue of fact, not dismissed at summary judgment as a matter of law.

By all appearances, to avoid paying a claim, State Farm has capitalized on the fact that the shop and residence, both covered as "dwellings" at the time of the loss, were separated upon reconstruction. On its face, this is a violation of State Farm's fiduciary duty to the Pooles.

Further, while State Farm attempts to down play this mistake, State Farm made an inexcusable (and unexplained) mistake in wrongfully determining that the replacement cost value of the damage to Poole's home. State Farm was forced to admit during the litigation that the replacement cost value of the covered dwelling was \$302,317.73. However, at all meaningful times during the claims administration, State Farm asserted the RCV value to be \$247,894.59. State Farm wrongfully considered items as "paid when incurred" and not a part of the actual cash value calculation. State Farm does not even try to explain its actions and only corrected it when confronted during deposition. State Farm asserts

that this was a “good faith mistake,” but failed to present any evidence on how such a “mistake” could happen, good faith or otherwise.

State Farm’s untenable position regarding RCV calculation resulted in an underpayment to the Pooles of \$600 for actual cash value. While this may seem a nominal amount, it still required litigation and depositions in order to get it corrected. A trier of fact should determine whether State Farm engaged in bad faith claims administration for its position of the RCV during claims administration.

State Farm continues to address the Insurance Fair Conduct Act issue as if it were or should have been brought as a separate claim. The Pooles brought a bad faith claim that was, in part, based upon the unreasonable denial of Option ID Coverage. RCW 48.30.015 allows for a party making a claim for an unreasonable denial for coverage or payment to seek recovery of actual damages, attorneys’ fees and costs, as well as potential treble damages. Since the Pooles’ bad faith claim *is* such a claim, State Farm’s attempts to address separate “IFCA claim” is curious and difficult to respond to. The Pooles bad faith claim is the “IFCA claim,” and if State Farm were found to have unreasonably denied the Option ID coverage, remedial damages pursuant to RCW 48.30.015 would be available to the Pooles.

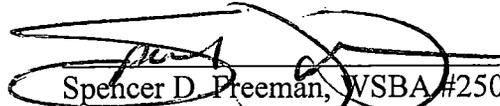
### **III. CONCLUSION**

The plain language and practical application of the Option ID coverage in State Farm’s Policy is to consider the costs of rebuilding all aspects of a structure that was covered at the time of the loss, even if rebuilt as multiple structures. The Pooles’ shop was covered as a dwelling at the time of the loss. Reconstruction costs should be considered upon

rebuilding the shop even if as a separate structure. To find otherwise is an absurd result. The fact that State Farm concedes it would pay Option ID coverage extension of the new shop and new residence shared a roof line or wall illustrated the absurdity of the result. Thus, the Pooles' breach of contract claim should be reinstated.

State Farm's denial of Option ID coverage was unreasonable and untenable, a position taken to protect the financial interests of State Farm. Whether based upon ambiguity of the policy language or a clear reading, a jury should determine whether State Farm's actions were reasonable. The bad faith claims and CPA claims should also, therefore, be reinstated.

DATED this 29<sup>th</sup> day of January, 2018.

  
Spencer D. Freeman, WSBA #25069  
Attorney for Appellants

FILED  
COURT OF APPEALS  
DIVISION II

2018 JAN 29 PM 2:47

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,

Plaintiffs,

vs.

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

Case No.: 50140-6-II

**CERTIFICATE OF SERVICE**

I, Jeffrey L. 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 January 29, 2018 at approximately 3:00pm I caused a true and correct Reply Brief in the above referenced case matter to be delivered by hand to the addressed listed below:

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

This addressed was obtained from the Washington State Court of Appeal's website, Washington Courts, Court of Appeals Division.

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

Signed this 29<sup>th</sup> Day of January, 2018, at Tacoma, Washington.

  
Jeffrey L. Cully

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COURT OF APPEALS  
DIVISION II

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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,

Plaintiffs,

vs.

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

Defendant.

Case No.: 15-2-12947-9  
Appeals No: 50140-6-II

**DECLARATION OF MAILING**

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

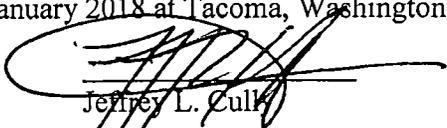
1. I deposited in the mails of the United States Postal Service (USPS) a properly  
stamped and addressed package, postage prepaid, addressed to:

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:

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

EXECUTED this 29<sup>th</sup> day of January 2018 at Tacoma, Washington

  
Jeffrey L. Cully

DECLARATION OF MAILING - 1

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