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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL POOLE and VICKY POOLE,

Appellants,

v.

STATE FARM INSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Trial Court was correct in granting summary judgment to Defendant State Farm Fire & Casualty Company (State Farm) because Plaintiffs Poole sought Option ID coverage that was not provided for by their insurance policy.

A fire destroyed Plaintiffs' residence which also contained an attached shop. State Farm insured the Plaintiffs' residence as a dwelling, with the policy providing that: "**Dwelling.** We cover the dwelling used principally as a private residence on the **residence premises** shown in the **Declarations.**" The policy also stated that the Dwelling "includes structures attached to the dwelling." The policy also insured, under a separate limit, dwelling extensions, which were other structures on the residence premises separated by clear space. Pre-loss there was a barn on the premises that was a dwelling extension, and that barn was also destroyed by the fire.

The policy provided that, subject to the policy limits, State Farm would pay the cost to repair or replace the dwelling with similar construction and for the same use as the destroyed dwelling. The policy provided for payment of actual cash value at the time of the loss; and, after construction was completed, allowed for payment up to the applicable limit of liability not to exceed the cost to repair or replace the damaged part of the property. The policy further provided for Option ID coverage which would allow payment

of additional amounts if the amount the insured actually and necessarily spent to replace the damaged dwelling structure exceeded the limit of liability.

After the fire, State Farm paid the actual cash value of Plaintiffs' residence.

Plaintiffs chose to build a much larger residence and to build a separate detached shop. The Plaintiffs' pre-loss residence had two stories with one bedroom and one bathroom with 1,000 square feet of living space, and had approximately 4,000 square feet of attached shop space. The Plaintiffs' post-loss residence was a one story, two bedroom, two bathroom house with approximately 1,900 square feet. That structure qualified as a dwelling because it was principally used by the Plaintiffs as their private residence. Post-loss, the Plaintiffs also built a separate shop with 2,160 square feet of enclosed space and another 3,200 square feet of roof covered only space. That structure did not qualify as a dwelling because it was not used as the Plaintiffs' private residence, and because – unlike the pre-loss shop area – it was not attached to the Plaintiffs' dwelling.

Before building those two separate structures, the Plaintiffs submitted the contract to build those structures to State Farm, and State Farm advised that the Option ID coverage did not apply because the contract to build the house was for less than State Farm had already paid in actual cash value, and because the proposed shop was not attached to the proposed residence, was a

dwelling extension, and the two proposed structures were not similar construction to the one structure pre-loss dwelling that State Farm had insured.

Provided with that knowledge, Plaintiffs made the choice to proceed with building a replacement dwelling and a separate shop – which would be a dwelling extension. The two structures that emerged from that choice were not similar construction to the single structure dwelling that was destroyed by the fire. Before the loss, there had been one dwelling which included about 1,000 feet of living space, and 4,000 feet of attached shop space. After the loss there was one dwelling with about 1,900 feet of living space and a separate detached shop with about 5,300 square feet of space - which was a dwelling extension and not a dwelling. Because the two post-loss structures were not similar construction to the one pre-loss dwelling, the Option ID coverage did not apply.

It was the Plaintiffs' prerogative to make the choice to build separate structures with much more living space and more total shop space, but their preference for building a larger house and a separate shop, and their belief that they should get option ID coverage did not entitle them to Option ID coverage when that coverage was not provided by the policy. Accordingly, State Farm's determination to deny Option ID coverage was reasonable and consistent with policy language, was not an IFCA violation, was not in bad

faith, and was not a violation of the CPA. The Trial Court was correct in granting State Farm summary judgment, and State Farm asks this Court to affirm.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The Trial Court was correct granting summary judgment to State Farm and that decision should be affirmed.

III. COUNTERSTATEMENT OF ISSUES

State Farm acknowledges Plaintiffs' assignments of error but believes the issues associated with those alleged errors are more appropriately stated as follows:

1. The insurance policy only provided for Option ID coverage when the amount spent by the insureds to rebuild a dwelling with similar construction exceeded the applicable limit. Post-loss, the Plaintiffs built a dwelling and a separate detached shop that were not of similar construction to the one dwelling structure that existed pre-loss. Under those circumstances, was the Trial Court correct in finding there was no Option ID coverage and granting State Farm summary judgment.
2. To establish any of the extra-contractual claims asserted by Plaintiffs, Plaintiffs, among other things, would have to prove that State Farm's determination to deny Option ID coverage was unreasonable. Given that State Farm's denial of Option ID coverage was correct and supported by the policy language, was the Trial Court correct in granting State Farm summary judgment that included dismissal of Plaintiffs' extra-contractual claims.

IV. STATEMENT OF THE CASE

Plaintiffs' claims against State Farm arose out of a fire loss on July 17, 2014. CP 2. Plaintiffs owned property at 21 Three Devils Road, Malott, Washington. CP 2. Plaintiffs were insured under a homeowner's policy with State Farm, Policy no. 47-GW-28783-3 ("Policy"). CP 2. The Policy had limits of \$230,748 for the dwelling, \$52,823 for the dwelling extension, and \$173,061 for contents/personal property. CP 122. The Policy also provided for payment of adjusted living expenses ("ALE"). CP 123. The Policy included Option ID coverage: \$46,149.60 for the dwelling or \$4,614.96 for the dwelling extension. CP 123. There was no dispute that Plaintiffs' fire loss is covered under the State Farm policy. The parties disputed the extent of the coverage available, in particular the availability of the \$46,149.60 in Option ID coverage for the dwelling. The Trial Court resolved that dispute in favor of State Farm and entered summary judgment for State Farm on February 24, 2017. CP 491-492. Recapped below are the facts before the Trial Court regarding the applicable policy language, Plaintiffs' pre-loss property, Plaintiff's post-loss property, and State Farm's actions in handling the claim.

A. State Farm Policy Language

Plaintiffs were insured under a Washington Homeowners Policy FP7955WA with Policy Number 47-GW-2878-3. CP 130-152. There is no question that the Policy was in effect at the time of the loss and the limits are

as stated.

The following policy provisions apply:

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**;
- c. Foundation, floor slab, and footings supporting the dwelling; and
- d. Wall to wall carpeting attached to the dwelling.

2. **Dwelling Extension.** We cover other structures on the **residence premises**, separated from the dwelling by clear space. Structures connected to the dwelling by only a fence, utility line, or similar connection are considered to be other structures.

We do not cover other structures:

- a. Not permanently attached to or otherwise forming a part of the realty;
- b. Used in whole or in part for **business** purposes;
- c. Rented or held for rental to a person not a tenant of the dwelling unless used solely as a private garage. (CP 139)

* * *

SECTION I – LOSS SETTLEMENT

Only the Loss Settlement provisions shown in the **Declarations** apply. We will settle covered property losses

according to the following:

COVERAGE A – DWELLING

1. A1 – Replacement Cost Loss Settlement- Similar Construction

a. We will pay the cost to repair or replace with similar construction and for the same use on the premises shown in the **Declarations**, the damaged part of the property covered under **SECTION I – COVERAGES, COVERAGE A – DWELLING**, except for wood fences, subject to the following:

(1) until actual repair or replacement is completed, we will pay only the actual cash value at the time of the loss of the damaged part of the property, up to the applicable limit of liability shown in the **Declarations**, not to exceed the cost to repair or replace the damaged part of the property;

(2) when the repair or replacement is actually completed, we will pay the covered additional amount you actually and necessarily spend to repair or replace the damaged part of the property, or an amount up to the applicable limit of liability shown in the **Declarations**, whichever is less;

(3) to receive any additional payments on a replacement cost basis, you must complete the actual repair or replacement of the damaged part of the property within two years after the date of loss, and notify us within 30 days after the work has been completed; and

(4) We will not pay for increased costs resulting from enforcement of any ordinance or law regulating the construction, repair or demolition of a building or other structure, except as provide under **Option OL – Building Ordinance or Law Coverage**. (CP 144).

* * *

OPTIONAL POLICY PROVISIONS

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

Report Increased Values. You must notify us within 90 days of the start of any new building structure costing \$5,000 or more; or any additions to or remodeling of building structures which increase their values by \$5,000 or more. You must pay any additional premium due for the increased value. We will not pay more than the applicable limit of liability shown in the **Declarations**, if you fail to notify us of the increased value within 90 days. (CP 150).

B. Plaintiffs' Pre-Loss Property

Pre-loss, Plaintiffs built two structures on the property on or about 2005-2006: a dwelling/shop and a horse barn. CP 43. The dwelling/shop consisted of a metal sided building on a stem wall and slab floor foundation. CP 48. The footprint of the building was approximately 4,000 square feet. CP 44-45, 69. There was a 3,000 square foot shop on the ground floor, which included a small office. CP 46, 69. There was a two-story, 1,000 square foot

one bedroom, one bathroom apartment. CP 47-48. There was 1,620 square feet of roof only covered outdoor space as well. CP 46. The barn consisted of 1,734 square feet of covered indoor space and 1,152 square feet of outdoor roof only covered space. CP 49. Inside the barn were four horse stalls, a tack room, and a small office. CP 49.

Plaintiffs' property, including the dwelling/shop, barn, and personal property, was lost in the Carlton Complex Fire on July 17, 2014.

C. Plaintiffs' Post-Loss Property

The rebuilt space consists of three separate buildings: a two-bedroom, one story, two bathroom home with approximately 1,900 square feet; a separate shop with 2,160 enclosed square feet and 3,200 in roof covered only space; and the barn with 2,300 covered enclosed square feet and 576 square feet roof only cover. CP 51, 53, 55. The cost of building the house post-fire was \$208,947.47.¹ CP 52, 104-112, 113-118.

Plaintiffs do not have any complaints as to State Farm's handling of the property loss claim for the barn, payment for debris removal, personal property loss, or payments for ALE.² CP 56, 57, 59, 91, 92, 93.

State Farm paid \$309,793.09 under Coverage A reflecting the actual

¹ Worden Decl., Ex. A at 24:18-20; Ex. F (M. Poole dep ex. 24 floorplan of the home and photographs of the rebuilt structures at MP001282-89); Ex. G (M. Poole dep ex. 28 photographs of rebuilt structures at POOLE00515-519).

² Worden Decl., Ex. A. at 31:2-4; 43:4-6; 75:11-19. Worden Decl., Ex. D (V. Poole dep.) at 15:22-24; 21:4-6; 23: 6-14.

cash value of the dwelling, policy limits for the barn as a dwelling extension, debris removal for the dwelling and dwelling extension, and payment for trees and shrubs.³ CP 57, 123,101-102.

D. Claims Handling

State Farm received notice of the fire on July 18, 2014. CP 123. Claim Representative Christina Jalali contacted the Plaintiffs and left a voicemail, and sent an email. CP 123. She spoke with Mr. Poole briefly. CP 123. On July 21, 2014, Ms. Jalali met with the Plaintiffs and advanced \$23,600 under the Policy's personal property coverage and ALE coverage.⁴ CP 123, 153-154. On August 2, 2014, Ms. Jalali sent a letter to the insureds confirming their conversation on July 21st, setting forth the policy limit information, and confirming the \$20,000 advance.⁵ CP 153-154. State Farm continued to try to contact the insureds by phone on August 3, 2014 and August 5, 2014. CP 123. State Farm connected with Plaintiffs to discuss the personal property loss and getting an inventory together. CP 123.

On August 8, 2014, Ms. Jalali sent a second letter explaining the coverages and addressing Option ID, which she noted "is available if the amount you actually and necessarily spend to replace the damaged building

³ Worden Decl., Ex. E (M. Poole dep ex. 11); Ex. A at 43:14-44:5. *See also* Jalali Decl. at ¶5

⁴ Jalali Decl. at ¶ 7; Ex. B (Aug. 2, 2014 ltr).

⁵ *Id.* at Ex. B.

(like kind and quality) exceeds the applicable limit.”⁶ CP 157-159.

Ms. Jalali continued to keep the insureds apprised of the status of the claim and getting information about the proposed re-build. CP 124. On September 17, 2014, State Farm issued a check for \$295,604.57 under Coverage A for the dwelling/shop loss, which consisted of the actual cash value of the dwelling, actual cash value of the barn/dwelling extension, and payment for debris removal. CP 124, 161-162. On September 30, 2014, State Farm issued a policy limits check to Plaintiffs under their personal property coverage, Coverage B, for \$153,061 (after accounting for the \$20,000 advance).⁷ CP 124, 168. State Farm continued to process ALE payments for the Plaintiffs and paid supplemental debris removal costs.⁸ CP 124.

In March 2015, Plaintiffs asked for another explanation on the Option ID coverage. On March 31, 2015, Ms. Jalali wrote to Plaintiffs on the Option ID coverage.⁹ CP 171-174. In particular, she noted the Option ID limit is paid if the amount “you actually and necessarily spend to repair or rebuild the damaged building structure exceeds the applicable limit of liability.” CP 171-174.¹⁰ Because the Plaintiffs elected to build the dwelling and shop as separate buildings, Option ID coverage for the dwelling was not available

⁶ *Id.* at Ex. C (Aug. 8, 2014 ltr).

⁷ *Id.* at Ex. F (Sept. 30, 2014 ltr).

⁸ Jalali Decl., ¶12.

⁹ *Id.* at Ex. G (March 31, 2015 ltr).

¹⁰ *Id.*

based on an estimate for the dwelling rebuild of \$183,848 and State Farm's prior payment of \$230,126.71 for the dwelling. Option ID coverage was not triggered as the cost to rebuild the dwelling did not exceed the amount State Farm had already paid.¹¹ CP 171-174.

On April 28, 2015, State Farm received the signed contracts for the rebuilding of the property. CP 125. The dwelling totaled \$183,848; the shop totaled \$154,346.08; and the barn totaled \$47,000. CP 176-177. State Farm had paid the dwelling at \$230,126.71 and the barn at \$52,710.02. On May 4, 2015, State Farm denied the claim for Option ID coverage for the dwelling again, noting the cost to rebuild the dwelling and the barn did not exceed the amounts State Farm already paid on the dwelling and the barn.¹² CP 176-177. State Farm also declined any Option ID coverage on the shop, citing the Policy that provides State Farm will pay for "similar construction for the same use on the same premises. The shop is not the similar construction we insured." CP 176-177.

Plaintiffs hired public adjuster Jack Thomas in May 2015, who sent an IFCA notice on May 28, 2015 and argued the Plaintiffs were building "similar construction" as the buildings were being used for the same

¹¹ *Id.*

¹² *Id.* at Ex. H (May 4, 2015 ltr).

purpose.¹³ CP 179-180. On June 9, 2015, attorney Tim Cronin responded on behalf of State Farm, reiterated why there was no Option ID coverage available, and documented the claims history to evidence the absence of an IFCA or WAC claims handling violation.¹⁴ CP 183-185.

State Farm continued to monitor the claim, pay ALE to Plaintiffs, and address Plaintiff's requests regarding Option ID coverage and other policy issues, including agreeing to extend the suit provision for three months to October 17, 2015. CP 126. On September 3, 2015, the Plaintiffs emailed State Farm again asking for the dwelling Option ID coverage and advising the rebuild costs would exceed \$450,000. State Farm responded the following day and advised there was no documentation the dwelling or barn rebuild would exceed the actual cash value.¹⁵ CP 187-188. The proposed shop was not attached to the dwelling and would be considered a dwelling extension. The actual cash value of the dwelling and dwelling extension policy limit had been paid. CP 188-189.

On September 22, 2015, State Farm received a written statement from a contractor on the house cost totaling \$180,948. CP 126. State Farm received another letter from Mr. Thomas on October 5, 2015. On October 8, 2015, State Farm responded denying the availability of the Option ID

¹³ *Id.* at Ex. I (IFCA notice).

¹⁴ *Id.* at Ex. J (June 9, 2015 ltr).

¹⁵ *Id.* at Ex K (Sept. 4, 2015 ltr).

coverage and advising that it paid \$230,126.71 in actual cash value on the dwelling, which has not been exceeded in incurred rebuild costs. CP 190-193. Further, State Farm had no evidence other coverages, like the Option OL coverage, were triggered and provided the applicable policy language. CP 190-193. Later in October 2015, State Farm received a request on whether State Farm would consider the dwelling Option ID coverage if the buildings were attached. CP 127. State Farm timely responded via letter dated October 14, 2015, and noted it would consider any new information including documentation showing the buildings shared a roof or documenting the amount of space between the buildings.¹⁶ CP 195. Plaintiffs then filed suit on October 15, 2015. CP 1-7.

V. ARGUMENT

When reviewing an order on summary judgment, the Court of Appeals makes the same inquiry as the Trial Court, and considers all legal questions de novo.¹⁷

As a moving party, State Farm is entitled to summary judgment where “there is no genuine issue as to material fact and the moving party is entitled to a judgment as a matter of law.”¹⁸ Plaintiffs must come forth with specific

¹⁶ *Id.* at Ex. M.

¹⁷ *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d, 573, 141 P.3d 1 (2006).

¹⁸ CR 56(c).

facts in support of their claims.¹⁹ Speculation, argumentative assertions, and conclusory statements are not sufficient to defeat a summary judgment motion.²⁰ Plaintiffs also have the burden of making a factual showing sufficient to establish the essential elements of their claims on which they bear the burden of proof at trial.²¹ Factual issues may be decided on summary judgment “when reasonable minds could reach but one conclusion from the evidence presented.”²² Furthermore, a party moving for summary judgment can meet its burden by pointing out to the Trial Court that the nonmoving party lacks sufficient evidence to support its case.²³

This matter involves a dispute regarding the coverage available under the policy. In an insurance case where the facts are not in dispute, coverage depends solely on the language of the insurance policy, and the interpretation of the policy is a question of law.²⁴ In construing the language of an insurance policy, the entire contract must be construed together so as to give

¹⁹ *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

²⁰ CR 56(e); *Diamond Park, Inc. v. Frontier Bldg. Ltd. P'ship*, 72 Wn. App. 314, 319, 864 P.2d 954 (1993); *Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 288, 227 P.3d 297, 301 (2010).

²¹ See *Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 266 P.3d 881 (2011).

²² *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 47, 846 P.2d 522 (1993) (quotation omitted).

²³ *Seybold v. Neu*, 105 Wn. App. 666, 19 P.3d 1068 (2001).

²⁴ *Ramm v. Farmers Ins. Co.*, 200 Wn. App. 1, 4, 401 P.3d 325 (2017).

force and effect to each clause.²⁵ If the language in an insurance contract is clear and unambiguous, the court must enforce it as written and may not modify the contract or create ambiguity where none exists.²⁶ If a policy provision on its face is fairly susceptible to two different but reasonable interpretations, the policy is ambiguous and the court must attempt to discern and enforce the contract as the parties intended.²⁷ Overall, a policy should be given a practical and reasonable interpretation rather than a strained or forced construction that leads to an absurd conclusion, or that renders the policy nonsensical or ineffective.²⁸

Under those standards, the Trial Court correctly dismissed Plaintiffs' claims on summary judgment as the Plaintiffs were not entitled to Option ID coverage, as Plaintiffs were paid benefits consistent with the policy terms, and as there was no evidence showing that State Farm's position on the Option ID coverage was unreasonable or that its adjustment of the claim was unreasonable.

²⁵ *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 456-57, 760 P.2d 337, 340 (1988) (citing *Ramm v. Farmers Ins. Co.*, 200 Wn. App. 1, 4, 401 P.3d 325 (2017)).

²⁶ *Id.*; see also *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874, 854 P.2d 622, 625 (1993); *Greer v. Northwestern Nat'l Ins. Co.*, 109 Wn.2d 191, 198, 743 P.2d 1244 (1987).

²⁷ *Morgan*, 86 Wn.2d at 435; *Greer*, 109 Wn.2d at 198-200.

²⁸ *Morgan*, 86 Wn.2d at 434-35; see also *McDonald Indus. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 913, 631 P.2d 947 (1981).

A. The Trial Court's Order Granting State Farm Summary Judgment Should Be Affirmed Because Appellants Were Not Entitled to Option ID Coverage

Plaintiffs' contractual dispute with State Farm revolves around their perceived entitlement to the Option ID coverage for the dwelling. Plaintiffs do not dispute that they received the actual cash value for the dwelling and policy limits for the dwelling extension and have no complaints regarding the policy limits personal property payment under the Coverage B, payment of ALE under Coverage C, or debris removal payments. Plaintiffs believe that their choice to rebuild their residence to double its pre-loss size and build a completely separate shop entitles them to the Option ID coverage.

The plain language of the policy does not support Plaintiffs' belief, and Plaintiffs were not entitled to Option ID coverage as: (1) Plaintiffs' separately constructed post-loss shop was not a dwelling as defined by the policy; (2) the Plaintiffs did not replace their pre-loss dwelling with similar construction but instead chose to rebuild their residence to almost double its prior size and to build a completely separate shop; (3) there is no support in the policy language for Plaintiffs' contention that the definition of dwelling includes structures which are not attached to the dwelling; and (4) the Plaintiffs' contentions regarding other alleged contractual breaches are factually inaccurate and did not create issues of material fact that would prevent summary judgment.

1. Plaintiffs were not entitled to option ID coverage because Plaintiffs separately constructed shop did not qualify as a dwelling under the policy.

Plaintiffs incorrectly argue that by building an enlarged post-loss residence and a separate shop they rebuilt one damaged dwelling as two structures and that Option ID coverage would apply. Plaintiffs' argument is incorrect because Plaintiffs' attempted construction of the policy omits critical policy terms and definitions to come to the strained conclusion that the policy covers the new construction of three separate buildings when the policy insured two, and that the policy covers the construction as a "dwelling" of a building that does not meet the definition of either a "dwelling" or a "dwelling extension" that could be covered under the policy. As set out above, the policy defines dwelling and dwelling extension as follows:

SECTION I – COVERAGES

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

Dwelling includes:

- e. Structures attached to the dwelling

* * *

4. **Dwelling Extension.** We cover other structures on the **residence premises**, separated from the dwelling by clear space. Structures connected to the dwelling by only a fence, utility

line, or similar connection are considered to be other structures.

We do not cover other structures:

- d. Not permanently attached to or otherwise forming a part of the realty;
- e. Used in whole or in part for **business** purposes;
- f. Rented or held for rental to a person not a tenant of the dwelling unless used solely as a private garage.

There is no dispute that pre-loss State Farm insured a dwelling (the Poole's private residence) and the shop attached thereto and insured the barn as a dwelling extension. Plaintiffs want to construe the above language to require State Farm, post-loss, to pay Option ID coverage on the faulty premise that the post-loss unattached shop structure used for Mr. Poole's business is a "dwelling" which replaced the pre-loss residence. Plaintiffs incorrectly argue because the attached shop area qualified as a dwelling before the accident, the detached shop is a dwelling after.

To so conclude would invalidate the very definition of "dwelling" and the requirement that any rebuild is "similar construction." A "dwelling" is first and foremost the "primary residence." Any structures attached thereto may also qualify as a "dwelling" by virtue of being attached to the primary residence. Plaintiffs took advantage of that definition in their rebuild by attaching a garage to their new single-family home where there was not one

pre-loss.²⁹ CP 104, 108-109. This qualifies as a “dwelling.” But the unattached shop that Plaintiffs had built after the loss was not a “dwelling” as it was a separate structure not attached to Plaintiffs’ post-loss residence. Further, the post-loss shop would not qualify for coverage as a dwelling extension under the policy. As constructed post-loss, the shop would not be covered under the policy as the policy excludes dwelling extensions “used in whole or in part for business purposes,” and Plaintiff testified the shop was used for his machinist work.³⁰ CP 42. It would not be a practical or reasonable construction of the policy to find that Option ID coverage for rebuilding a dwelling would apply to a shop structure separate from the dwelling, which would not qualify for coverage under the policy as either a dwelling or a dwelling extension.

Plaintiffs assert that it is “overly technical” to not permit a policyholder to build a separate structure and have it qualify as a dwelling but that is precisely what the policy language provides. There is an articulable difference between dwelling and dwelling extension, and the definition of “dwelling” does not include unattached structures.³¹ Plaintiffs are effectively seeking to change the definition of “dwelling” by arguing that the policy

²⁹ Worden Decl., Ex. F at MP001282, 1286, 1287;

³⁰ Worden Decl., Ex. A at 10:13-23.

³¹ Neither includes the shop, which is used in whole or in part for Mr. Poole’s business. The Pooles had a separate policy for the business.

permits them to rebuild in any way they saw fit. It simply does not, so Plaintiffs' construction of the policy is neither reasonable nor harmonious.

2. Plaintiffs were not entitled to Option ID coverage because Plaintiffs did not replace their dwelling with similar construction.

State Farm complied with the Policy language in paying the actual cash value of the dwelling loss. The Policy provides for replacement cost loss settlement only for similar construction:

We will pay the cost to repair or replace with similar construction and for the same use on the premises shown in the **Declarations**, the damaged part of the property covered under **SECTION I – COVERAGES, COVERAGE A – DWELLING**, except for wood fences, subject to the following:

- (1) until actual repair or replacement is completed, we will pay only the actual cash value at the time of the loss of the damaged part of the property, up to the applicable limit of liability shown in the Declarations, not to exceed the cost to repair or replace the damaged part of the property;
2. when the repair or replacement is actually completed, we will pay the covered additional amount you actually and necessarily spend to repair or replace the damaged part of the property, or an amount up to the applicable limit of liability shown in the Declarations, whichever is less;

“Similar construction” is not defined in the Policy. Washington courts have addressed State Farm’s policy language and held the “similar

construction” language was not ambiguous.³² In *Allemand v. State Farm Insurance Company*, the Court of Appeals noted “similar” construction required “like” or “equivalent” construction.³³ The plain language definition of “similar” is “looking or being almost the same, although not exactly”³⁴ or “having a likeness or resemblance, especially in a general way.”³⁵ State Farm does not contend that the Plaintiffs were required to build an identical dwelling. But Plaintiffs’ rebuild does not qualify as “similar construction” under any reasonable definition of the words. This is not an instance where a house was rebuilt as a house but with a different layout or stucco instead of siding. Pre-loss, the Plaintiffs had one structure consisting of a small apartment and a large shop. Plaintiffs rebuilt a single-family home, double the size of the pre-loss apartment, and a large free-standing shop.

Plaintiffs’ reliance on *Starczewski v. Unigard Insurance Group* is misplaced as that case is not applicable to the issues in this matter, and as the *Allemand* case controls. In pertinent part, *Starczewski* is one of a line of cases addressing whether replacement costs necessarily includes costs for upgrades mandated by building codes. In *Starczewski*, the court addressed whether building costs incurred due to building code compliance were “necessary to repair or replace the damaged property.”³⁶ The *Starczewski*

³² *Allemand v. State Farm Ins. Co.*, 160 Wn. App. 365, 372, 248 P.3d 111 (2011). See also *Lesure v. Farmers Ins. Co.*, No. 48045-0-II, 2016, Wash. App. LEXIS 2218, at *6 (Wash. Ct. App. Sep. 20, 2016).

³³ *Allemand*, 160 Wn. App. at 372.

³⁴ <http://dictionary.cambridge.org/us/dictionary/english/similar>.

³⁵ <http://www.dictionary.com/browse/similar>.

³⁶ *Starczewski v. Unigard Ins. Group*, 61 Wn. App. 267, 274, 810 P.2d 58 (1991).

court held that “repair or replace” language necessarily included compliance with the building codes.³⁷ Subsequent courts revisited the issue, including courts addressing policy language that called for “like construction,” holding that “like” or “equivalent” construction did not mandate payment of replacement costs.³⁸ The court in *Allemand* synthesized these cases and noted that the State Farm policy at issue in that case (like the policy here), specifically addressed payment for building code upgrades.³⁹ Noting, “the ultimate controlling language is that found in the policy,” and finding the policy language was not ambiguous, the court held:

State Farm's original obligation under Coverage A is to provide “similar construction” in rebuilding the home. Unlike *Starzewski*, that phrase does not include paying for required code upgrades. Instead, the policy provides for necessary upgrades by Option OL. That coverage is the sole source of the obligation to pay for bringing the remodeled home up to code. But that coverage is limited to the 10 percent of Coverage A that the Allemands purchased. The necessary upgrades required more than that figure and State Farm thus properly tendered its limits under that coverage. It was not required to pay more for the upgrades.⁴⁰

Just as in *Allemand*, the policy language here controls and it is clear. This is not a case where the policy is silent—it calls for “similar construction” and expressly excludes unattached structures from the

³⁷ *Id.* at 274.

³⁸ See *Roberts v. Allied Grp Ins. Co.*, 79 Wn. App. 323, 901 P.2d 317 (1995); *Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245, 928 P.2d 1127 (1996), *review denied*, 131 Wn.2d 1018 (1997).

³⁹ 160 Wn. App. 365, 369, 248 P.3d 111, 113 (2011).

⁴⁰ *Allemand*, 160 Wn. App. at 373.

definition of “dwelling.” The language is clear and unambiguous and State Farm’s construction harmonizes the provisions of the policy.

Similarly, the Option ID - Increased Dwelling Limit applies only to those structures covered under Coverage A- DWELLING, applies to costs incurred to repair or replace the Dwelling, and is only payable once an insured incurs costs exceeding the applicable limit of liability to replace covered structures:

Option ID – Increased Dwelling Limit. We will settle losses to damaged building structures covered 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 Extension**.⁴¹

In replacing the dwelling, Plaintiffs elected to rebuild two separate structures when they had insured for one: a shop and one-bedroom primary residence in one. What they got post-fire was distinctly different: a two bedroom, two bathroom, single family home, double the size of the previous

⁴¹ As noted below, the Option ID coverage provides Option ID coverage for the dwelling or dwelling extension but not both.

residence with an attached garage and a 4,000 square foot shop combined with indoor and outdoor covered space devoted to Mr. Poole's business. It was Plaintiffs' choice as to how they wanted to rebuild but under no reasonable construction of the policy does the rebuild conform to the definition of "dwelling" or the requirement that the Plaintiffs rebuild with "similar construction." No reasonable purchaser of insurance should expect to insure one thing and rebuild something else that would not even be insurable under the policy. Looking at the actual policy language and the policy as a whole, this is the only reasonable construction of the policy language and the Trial Court was correct in granting State Farm summary judgment on Plaintiffs' claims.

3. There is no support in policy language or case law for Plaintiffs' contention that the definition of dwelling includes coverage for other unattached buildings.

Plaintiffs' Appeal Brief at pages 20-25 raised a new issue and argument not made before the Trial Court and contended that coverage for a dwelling includes other structures which are not attached to the dwelling.⁴² Plaintiffs' newly raised issue and argument should not prevent this Court from affirming the Trial Court's order of summary judgment dismissing the case against State Farm for at least three reasons.

First, that newly raised argument should not be considered by this

⁴² Plaintiffs' Opposition To Defendant's Motion For Summary Judgment did not include that argument. CP 196-220.

Court because it was not presented to the Trial Court, and consideration on appeal would violate RAP 9.12 which states “On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.”

Decisions of the Washington courts confirm that arguments newly raised before the appellate courts are not properly considered on appeal.⁴³ For example in *Sourakli v. Kryiakos*, the Court of Appeals, in considering an appeal brought by a gunshot victim, declined to consider arguments made by the gunshot victim that the defendants owed him a duty of care under the rescue doctrine and under a contract as those arguments were not made to the trial court.⁴⁴ In doing so, the court held that an argument not argued to the trial court cannot be raised for the first time on appeal and declined to consider the newly raised arguments:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the Trial Court.” RAP 9.12. An argument neither pleaded nor argued to the Trial Court cannot be raised for the first time on appeal. *Sneed v. Barna*,

⁴³ See *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 649, 835 P.2d 1030 (1992)(citing RAP 9.12 to hold that when the Department of Ecology did not raise an argument before the trial court, the Supreme Court would not consider that argument on appeal); *Sourakli v. Kryiakos*, 144 Wn. App. 501, 182 P.3d 985 (2008); *Silverhawk, LLC v. Keybank Nat'l Ass'n*, 165 Wn. App. 258, 265-266, 268 P.3d 958 (2011) (holding that “argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal,” and declining to consider a party’s analysis of a contract when that analysis was not before the trial court).

⁴⁴ 144 Wn. App. 501, 507-508, 182 P.3d 985 (2008)

80 Wn. App. 843, 847, 912 P.2d 1035 (1996). Sourakli's case against Titan on appeal depends entirely on arguments not raised below. He has not attempted to rebut the conclusions reached by our commissioner in the order granting discretionary review. We adopt our commissioner's reasoning and conclude Titan did not owe a duty to Sourakli as an agent for Mr. Lucky. We decline to consider whether Titan had a duty under the rescue doctrine or arising from its contract.⁴⁵

RAP 9.12 and the cases cited above should prevent this Court from considering Plaintiffs' newly raised argument.

Second, even if it were considered, Plaintiffs' newly raised argument should be rejected because it is opposite of the policy's clear and unambiguous language. The policy specifically provides that a dwelling includes "Structures attached to the dwelling" and it does not include unattached structures, like the post-loss shop, within the definition of dwelling:

SECTION I – COVERAGES

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

Dwelling includes:

- f. Structures attached to the dwelling
- g. Material and supplies located on or adjacent to the **resident premises** for use in the construction, alteration, or repair

⁴⁵ *Id.* at 509.

of the dwelling or other structures on the **resident premises**;

Plaintiffs' argument that the definition of dwelling anticipates coverage of other unattached structures as a dwelling is both in opposition to the clear policy language and would render the policy's coverage for dwelling extensions superfluous as there would be no reason to offer coverage for unattached structures as dwelling extensions if those unattached structures were already covered as part of the dwelling.

Third, even if it were considered, Plaintiffs' newly raised argument should be rejected because it is not supported by citation to case law.

4. Plaintiffs' contentions regarding other alleged contractual breaches before litigation are factually inaccurate and did not create issues of material fact that would prevent summary judgment.

Both in their summary judgment opposition and in their Appeal Brief, Plaintiffs attempted to distract from the dispositive issue of whether Plaintiffs were entitled to Option ID coverage by arguing State Farm failed to pay the balance of the policy limits for the barn and failed to pay the Option ID Dwelling extension limits of \$4614.96. The Trial Court was not distracted by those arguments and nor should this Court be.

Plaintiffs' assertion that State Farm is required to pay them Option ID coverage on the dwelling extension and the dwelling contravenes the express language of the policy, which entitles them to Option ID coverage under one

or the other but not both. Plaintiffs also stated, without providing any evidence, that they provided State Farm with the itemized receipts and information to substantiate their claim for Option ID dwelling extension coverage. They did not. As noted in the October 5, 2015 letter from claim specialist Christina Jalali, State Farm had written to Plaintiffs' public adjuster stating "In order for us to review what costs were incurred for the barn, please provide the specific invoices for the barn and mark on the invoice that they are for the barn. To date, we have received multiple pages of random invoices that do not mark what building they are for." CP 190. State Farm asked for clarification on what invoices were attributable to each project but received no clarification. CP 190. Plaintiffs do not contest that. What Plaintiffs provided to the Trial Court in their summary judgment opposition was a never-before-provided spreadsheet (dated 1-23-16) detailing purported invoices without having ever actually provided an accounting to State Farm. CP 321.

State Farm cannot be held to have acted in bad faith, breached the contract, or violated the WAC claims handling regulations or CPA when it was not provided information that it explicitly requested from the insureds to substantiate their request. The policy plainly provides that in order to receive replacement cost, the insured must "actually and necessarily spend to repair or replace the damaged part of the property." Plaintiffs were building three

structures simultaneously. With additional replacement cost coverage available for the dwelling (approximately \$600) and dwelling extension (approximately \$112) and information suggesting that the Plaintiffs had not expended in excess of what State Farm had paid in actual cash value for the dwelling, it was entirely reasonable for State Farm to ask its insureds to identify the invoices being submitted.

In its summary judgment reply, State Farm noted that with the new documentation provided with the summary judgment opposition, State Farm can process any outstanding replacement cost owed. CP 481-482. Further, showing the red herring nature of Plaintiffs' argument regarding other alleged contractual breaches is that after receiving that documentation in the summary judgment opposition, State Farm, as shown by the March 13, 2017 letter to the Plaintiffs which is attached as Appendix 1, did pay \$4614.96 in Option ID limits applicable to the dwelling extension.⁴⁶

Similarly, the arguments made by Plaintiffs that State Farm had miscalculated \$600 in its payment to Plaintiffs and that State Farm had failed to pay \$112.98 for barn related expenses are likewise red herrings that raise no issue of material fact. As documented by the Supplemental Declaration of

⁴⁶ Per RAP 10.3(8), State Farm asks that the Court consider the March 13, 2017 letter as an appendix because that letter did not exist at the time of the summary judgment but does document that State Farm followed through on the assertion made in its Reply Brief that it would process outstanding replacement cost on submission.

Christina Jalali (CP 488-490), State Farm addressed those concerns newly raised by Plaintiffs in their opposition to the summary judgment motion, by: (1) declaring that State Farm had previously mailed a check to Plaintiffs for \$112.98 on March 21, 2016, that Plaintiffs had not cashed that check, and that State Farm reissued that check; and (2) declaring that State Farm had also issued a check for \$621.29 reflecting the remaining Coverage A dwelling policy limits.

State Farm's attention to new information it received in the summary judgment opposition demonstrates that State Farm acted with good faith and fulfilled its obligations under the contract.

B. The Trial Court Properly Dismissed the Plaintiffs' Extra-Contractual Claims Because the Plaintiffs Were Not Entitled To Option ID Coverage and Because There Was No Evidence That Could Establish an IFCA Violation, Bad Faith, or A CPA Violation

The argument that underlies that Plaintiffs' extra-contractual claims is that State Farm's interpretation of the Policy and the denial of Option ID Dwelling limits extension was unreasonable and untenable. That argument is wrong. For the reasons addressed above, State Farm was correct in its determination that Plaintiffs were not entitled to Option ID coverage. Because State Farm's coverage position was reasonable and correct, the Trial Court was correct in dismissing the extra-contractual claims.

In the absence of bad faith in the investigation of a claim,⁴⁷ if an insurer is correct in its coverage determination, it is not liable for extra-contractual claims because a correct denial of coverage is reasonable. For example, in *Wright v. Safeco Insurance Co.*,⁴⁸ the Court of Appeals stated that the test for whether there is bad faith denial of coverage is whether that denial was reasonable, and dismissed bad faith claims against an insurer when the court determined that the insurer had properly denied coverage:

Safeco contends the Trial Court erred in denying summary judgment on Wright's bad faith claim. Insurers have a duty to deal fairly and in good faith with their insureds. RCW 48.01.030. A denial of coverage that is unreasonable, frivolous, or unfounded constitutes bad faith. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998). The test for bad faith denial of coverage is not whether the insurer's interpretation is correct, but whether the insurer's conduct was reasonable. *Torina Fine Homes v. Mut. of Enumclaw Ins. Co.*, 118 Wn. App. 12, 21, 74 P.3d 648 (2003), review denied, 151 Wn.2d 1010 (2004).

Wright argues there is a material issue of fact as to whether Safeco's decision to deny coverage was in bad faith. Wright claims Safeco relied on exclusions to delay paying on covered claims. As previously discussed, Safeco properly denied coverage in reliance on the construction defect and mold exclusions, and there is no evidence Safeco's conduct

⁴⁷ See *Coventry v. American States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998)(allowing an insured to maintain an action for bad faith investigation and violation of the CPA regardless of whether the insurer was ultimately correct in determining that coverage did not exist.)

⁴⁸ 124 Wn. App. 263, 109 P.3d 1 (2004)

in denying Wright's claims was unreasonable or in bad faith.⁴⁹

Further, as noted in *Wright*, even if an insurer's position on coverage is ultimately determined to be incorrect, the insurer is not liable for extra-contractual claims if its coverage position was reasonable. Moreover, summary judgment may be granted to an insurer on extra-contractual claims even if the court determines that the insurer's coverage denial was incorrect but not unreasonable. For example, in *Transcontinental Insurance Co. of Washington v. Washington Public Utilities Districts' Utilities System*, the Washington Supreme Court found that an insurer was incorrect in its coverage denial but was still entitled to dismissal of the bad faith and CPA claims against it when the record did not establish that its actions were unreasonable, frivolous, or untenable:

Finally, we agree with the Trial Court that Transcontinental's actions did not rise to the level of bad faith so as to violate the Consumer Protection Act, RCW 19.86. A denial of coverage based on a reasonable interpretation of the policy is not bad faith, *Castle & Cooke, Inc. v. Great Am. Ins. Co.*, 42 Wn. App. 508, 518, 711 P.2d 1108, review denied, 105 Wn.2d 1021 (1986), and even if incorrect, does not violate the Consumer Protection Act if the insurer's conduct was reasonable. *Villella v. Public Employees Mut. Ins. Co.*, 106 Wn.2d 806, 821, 725 P.2d 957 (1986). Here, the record does not establish that Transcontinental's actions were unreasonable, frivolous, or untenable. See *Felice v. St. Paul Fire & Marine Ins. Co.*, 42 Wn. App. 352, 361, 711 P.2d 1066 (1985), review denied, 105 Wn.2d 1014 (1986).

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⁴⁹ *Wright*, 124 Wn. App. at 263.

⁵⁰ 111 Wn.2d 452, 470-471, 760 P.2d 337 (1988)

As was the case in *Transcontinental* and in *Wright*, dismissal of the extra-contractual claims against State Farm here was appropriate because, for the reasons discussed in Section A above, State Farm's determination that Plaintiffs were not entitled to Option ID coverage was reasonable and correct. While the lack of evidence that State Farm took an unreasonable coverage position is sufficient to affirm the summary judgment in State Farm's favor, the arguments made by Plaintiffs as to the specific extra-contractual claims for IFCA violation, bad faith, and CPA violation are addressed below.

1. There is no basis for an IFCA claim because there was no unreasonable denial of a claim for coverage or benefits.

As a threshold matter, while the Plaintiffs' assignments of error included the Trial Court granting summary judgment on the breach of contract claim, the bad faith claim, and the CPA claim, there was no assignment of error regarding dismissal of the IFCA claim.⁵¹ Further, at page 28 of the Appeal Brief, Plaintiffs stated "The Pooles did not outline an IFCA claim separately but requested damages pursuant to IFCA." Based on these statements it would be proper to affirm dismissal of the IFCA claim because Plaintiffs did not include dismissal of the IFCA claim in their assignments of error and because there would be no basis to award damages pursuant to IFCA in the absence of proof of an IFCA claim.

⁵¹ See Plaintiff's Appeal Brief at page 3.

Even if the Court deems Plaintiffs to have crossed the threshold of properly appealing dismissal of the IFCA claim, dismissal of the IFCA claim should be affirmed because there is no evidence of an unreasonable denial of a claim for coverage or benefits.

Plaintiffs vaguely asserted a claim for a purported violation of the Insurance Fair Conduct Act.⁵² RCW 48.30.015, by its express language, only applies when an insurer has “unreasonably denied a claim for coverage or payment of benefits.” Prior to when State Farm filed the summary judgment motion, numerous federal courts that have addressed the issue have held that WAC violations are insufficient to sustain an IFCA claim; there must be an unreasonable denial of benefits or coverage.⁵³ After State Farm filed its motion for summary judgment, the Washington Supreme Court issued its decision in *Perez-Crisantos v. State Farm Fire & Casualty Co.* which held that the IFCA statute does not allow for a cause of action based on WAC violations but only for an action based on an unreasonable denial of coverage or benefits.⁵⁴

Under those standards, dismissal of any IFCA claim was appropriate

⁵² CP 1-7, Compl. at 7 (asserting only a request for damages under IFCA).

⁵³ *Pinney v. Am. Family Mut. Ins. Co.*, No. C11-175MJP, 2012 WL 584961 (W.D. Wash. Feb. 22, 2012); *Travelers Indem. Co. v. Bronsink*, No. C08-1524JLR, 2010 WL 148366, at *2 (W.D. Wash. Jan. 12, 2010); *Lease Crutcher Lewis WA, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. C08-1862RSL, 2010 WL 4272453, at *5 (W.D. Wash. Oct. 15, 2010); *Weinstein & Riley v. Westport Ins. Corp.*, No. C08-1694 JLR, 2011 WL 887552, at *30 (W.D. Wash. Mar. 14, 2011).

⁵⁴ 187 Wn.2d 669, 672, 389 P.3d 476 (2017).

because there was no evidence that State Farm unreasonably denied coverage or benefits. By contrast, as was documented at paragraphs 5 and 11 of the Declaration of Christina Jalali, (CP 123-124) State Farm paid benefits including \$309,793 under Coverage A for damage to Plaintiffs' Dwelling and \$173,051 for Plaintiffs' damage to their personal property. Further there was no unreasonable denial of coverage or benefits as, for the reasons discussed above, State Farm's determination that Plaintiffs were not entitled to Option ID coverage was reasonable and correct.

2. There is no basis for a bad faith claim because State Farm's coverage position was reasonable and because there is no evidence showing that State Farm's adjustment of the claim was unreasonable.

In order to establish bad faith, an insured must establish that an insurer's actions were unreasonable, frivolous, or unfounded.⁵⁵ Plaintiffs have the burden of establishing bad faith.⁵⁶ An insurer does not act in bad faith where there is no real dispute that an insurer had a reasonable basis for its actions.⁵⁷ An insurer is entitled to summary judgment if reasonable minds could not differ that its actions were based upon reasonable grounds.⁵⁸ Further, as discussed above, the specific standard regarding whether there is

⁵⁵ *Smith v. Safeco*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003), citing *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002).

⁵⁶ See *Smith*, 150 Wn.2d at 486.

⁵⁷ *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 633, 915 P.2d 1140 (1996) (insurer not guilty of bad faith if "legitimate controversy" as to benefits due (quoting 15A GEORGE J. COUCH, COUCH ON INSURANCE § 58:1 (Ronald A. Anderson & Marks S. Rhodes, 2d rev.ed.1983)).

⁵⁸ See *Smith*, 150 Wn.2d at 486.

bad faith denial of coverage is whether that denial was reasonable, and, for the reasons discussed above State Farm's determination that Plaintiffs were not entitled to Option ID coverage was reasonable and correct such that dismissal of the bad claim was appropriate.

In addition, Plaintiffs' assertion that State Farm acted in bad faith by misrepresenting the replacement cost of the house is not supported by evidence. State Farm did not "misrepresent" the replacement cost value. The issue of replacement cost value on the dwelling first arose during the rule 30(b)(6) deposition of Dave Duray on February 7, 2017. During State Farm's deposition, the parties reviewed (within exhibit 2) a cost estimate wherein the replacement cost value was listed as \$302,317.73. CP 415. As discovered during the deposition, there were certain deductions from the replacement cost value that should not have been done, resulting in a lower replacement cost value identified in communications. CP 348-352. Certainly, there is no testimony that there was an active misrepresentation or any intent to have identified a different replacement cost value. *Id.*

A good faith mistake is not bad faith or unreasonable.⁵⁹ As stated in the summary judgment reply, after being apprised of the discrepancy during the deposition, State Farm remedied the discrepancy by paying the remaining

⁵⁹ *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998).

actual cash value to the dwelling policy limits. CP 484. As noted above in the discussion regarding Plaintiffs' other alleged contractual breaches, and as documented by the Supplemental Declaration of Christina Jalali (CP 488-490), State Farm issued a check for \$621.29 reflecting the remaining Coverage A dwelling policy limits that resulted from the discrepancy discovered during the Duray deposition. In addition, as discussed above, State Farm paid the balance of limits for Option ID Dwelling Extension of \$4614.96 when it received documentation of expenses in the summary judgment opposition, and State Farm resent the check for \$112.98 that Plaintiffs earlier failed to cash.

At most, the evidence before the Trial Court showed a discrepancy on a cost estimate which was corrected when brought to State Farm's attention. Under the best circumstance for Plaintiffs, that would be deemed a good faith mistake which was corrected once State Farm was apprised of the discrepancy. That does not constitute evidence of bad faith.

3. There is no basis for a CPA claim because Plaintiffs did not present evidence that could establish that State Farm's actions were unreasonable, that State Farm violated WAC regulations, or that Plaintiffs sustained injury to their business or property.

Plaintiffs also cannot establish a violation of the Consumer Protection Act. To prevail on a CPA claim, an insured must demonstrate: (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the

public interest, (4) which causes injury to the insured's business or property, and (5) which injury is causally linked to the deceptive act or practice.⁶⁰ While a violation of a WAC provision governing insurance practices constitutes a *per se* unfair trade practice, satisfying the first three elements of a CPA claim, an insurer's actions do not violate the CPA when it has a reasonable basis for its actions.⁶¹ Furthermore, an insured still must establish the remaining elements of injury to a person's business or property and causation. "Personal injuries, as opposed to injuries to "business or property," are not compensable and do not satisfy the injury requirement."⁶² Damages from mental distress, including anxiety, or inconvenience are not recoverable under the CPA.⁶³ Dismissal of the CPA claim was appropriate because there was no evidence showing State Farm's actions were unreasonable, because the evidence did not show WAC violations, and because the evidence did not show that Plaintiffs sustained injury to their business or property.

First, as with the claim for bad faith, the lack of evidence of

⁶⁰*Indus. Indem. Co. of the Nw, Inc. v. Kallevig*, 114 Wn.2d 907, 920-21, 792 P.2d 520 (1990), citing *Hangman Ridge Training Stable, Inc. v. Safeco Title Ins. Co.*, 105 n.2d 778, 784-85, 719 P.2d 531 (1986).

⁶¹*Am. Mfrs. Mut. Ins. v. Osborn*, 104 Wn. App. 686, 17 P.3d 1229 (2001); RCW 19.86.920. See also *Besel v. Viking Ins. Co.*, 105 Wn. App. 463, 483, 21 P.3d 293, 303 (2001) (citing *Kallevig*, 114 Wn.2d at 925).

⁶²*Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57-58, 204 P.3d 885, 899-900, (2009) (citing *Fisons*, 122 Wn.2d at 318; *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989)).

⁶³*Id.*

unreasonable conduct merits dismissal of the CPA claim. In the *Osborn* case, the Court of Appeals noted that RCW 19.86.920 imported a reasonableness standard into the CPA as a whole and applied that reasonableness standard to alleged WAC violations:

Osborn contends that because WAC 284-30-330(7) does not contain a specific "reasonableness" requirement, the reasonableness of the insurer's conduct is not a defense. But RCW 19.86.920 imports the reasonableness standard into the CPA as a whole:

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

(Emphasis added.) See also *Anderson*, 101 Wn. App. at 335 (holding that there is a reasonableness requirement in WAC 284-30-330(7)); *State v. Black*, 100 Wn.2d 793, 802-803, 676 P.2d 963 (1984) (holding that RCW 19.86.920 indicates the Legislature's recognition that the CPA does not prohibit reasonable acts or business practices); *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 915 P.2d 1140 (1996) (holding that a reasonableness requirement is implied in WAC 284-30-330(7)); *Starczewski v. Unigard Ins. Group*, 61 Wn. App. 267, 810 P.2d 58 (1991) (requiring a finding that the insurer had no reasonable justification for its conduct before finding a violation of WAC 284-30-330(7)).⁶⁴

Because, as discussed above, there is no evidence showing that State

⁶⁴ *Osborn*, 104 Wn. App. at 699-700.

Farm's conduct was unreasonable, the CPA claim must fail.

Second, it was appropriate to dismiss the CPA claim because the evidence did not show WAC violations as alleged in Plaintiffs' Appeal Brief. Plaintiffs failed to dispute that State Farm did not violate WAC 284-30-330(2), (5), (14), or (17), or WAC 284-30-380. Further, Plaintiffs cannot maintain any extra-contractual claims based on WAC 284-30-330(4), (6), (7), or (13) and have offered no admissible evidence to the contrary.

In regard to WAC 284-30-330(4), Plaintiffs cite no evidence that State Farm did not conduct a reasonable investigation or contest any of the facts State Farm set forth regarding its investigation. Rather, Plaintiffs assert that because State Farm came to a different conclusion, its investigation is flawed. That does not constitute a violation of WAC 284-30-330(4).

In regard to WAC 284-30-330(6), Plaintiffs' contention that State Farm violated this regulation is based on Plaintiffs' disagreement with State Farm's determination that Plaintiffs were not entitled to Option ID coverage. But State Farm acted reasonably in attempting to settle Plaintiffs' claim pre-suit in compliance with WAC 284-30-330(6). State Farm's position was well founded in fact and the applicable policy language. Plaintiffs failed to provide information requested by State Farm on the dwelling extension incurred costs. Plaintiffs have not provided any evidence to suggest that the costs incurred to rebuild a covered dwelling was more than what State Farm

already paid. There can be no question State Farm attempted in good faith to effectuate settlement but the parties disagreed on the availability of Option ID coverage for the dwelling. That does not constitute a violation of 284-30-330(6) where State Farm acted reasonably in trying to effectuate a reasonable settlement.

In regard to WAC 284-30-330 (7), no evidence supports the allegation that this regulation has been violated. Plaintiffs have not been awarded more at trial than what State Farm has paid. State Farm did not compel Plaintiff to litigate through any unreasonable actions. As evidenced in the summary judgment briefing and as discussed above, State Farm reasonably and correctly disputed the availability of Option ID coverage. Lastly, Plaintiffs inexplicably assert State Farm has compelled the Plaintiffs into appraisal. There has been no appraisal process requested or instituted and one would not be appropriate for this dispute. As such, there is no support for Plaintiffs' claims based on an alleged violation of WAC 284-30-330(7).

In regard to WAC 284-30-330(13), Plaintiffs' argument that State Farm did not explain its determination to them on the Option ID coverage is untenable. As documented in the Jalali declaration, State Farm sent numerous letters explaining the coverages to the Plaintiffs, including the reasons why Option ID coverage for the dwelling was not available. CP 122-

195.⁶⁵ State Farm repeatedly explained why it did not believe Option ID dwelling coverage had been triggered; Plaintiffs may have disagreed but there can be no reasonable dispute that State Farm complied with WAC 284-30-330(13).

Third, Plaintiffs have not articulated any injury to their business or property from State Farm's actions. Plaintiffs received the amounts due under the policy.

V. CONCLUSION

State Farm requests that this Court affirm the Trial Court's order granting summary judgment for it and dismissing Plaintiffs' claims with prejudice. While Plaintiffs raise some red herring side issues, the disagreement that underlies this lawsuit is whether the Plaintiffs were entitled to Option ID coverage when, after their dwelling was destroyed, they built a much larger dwelling and built a separate shop and tried to aggregate the cost of both those separate structures to claim Option ID coverage for their dwelling. Given that the detached shop did not meet the definition of a dwelling and given that the undisputed facts show that the two structures built post-loss were not similar construction to the pre-loss dwelling, the Trial

⁶⁵ See, e.g., Jalali Decl. Exs. C-I, J, K (letters dated August 8, 2014; Sept. 17, 2014; Sept. 22, 2014; Sept. 30, 2014; March 31, 2015; May 4, 2015; July 14, 2015; Sept. 4, 2015; Sept. 22, 2015). CP 122-195.

Court was correct in agreeing with State Farm that Plaintiffs were not entitled to Option ID coverage and in dismissing the claims against State Farm.

RESPECTFULLY SUBMITTED this 28th day of December 2018.

LEWIS, BRISBOIS, BISGAARD & SMITH LLP

By 
Gregory S. Worden, WSBA #24262
Laura Hawes Young, WSBA #39346
Attorneys for Respondent

CERTIFICATE OF SERVICE

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

1. I am a legal secretary with the law firm of Lewis Brisbois Bisgaard & Smith LLP.

2. On the 28th day of December, 2018, I caused to be delivered a copy of the foregoing document to the following party:

Spencer D. Freeman
Freeman Law Firm, Inc.
1107 1/2 Tacoma Ave. S.
Tacoma, WA 98402

- via U.S. Mail
- via Legal Messenger
- via Overnight Mail
- via Facsimile
- via Electronic Mail
- via ECF

SIGNED this 28th day of December, 2018 at Seattle, Washington.



Vicki Milbrad

APPENDIX 1

March 13th, 2017

2544 E. 8th
RECEIVED

APR 10 2017

BY: GSW

State Farm
State Farm Fire claims
P.O. Box 106169
Atlanta, GA 30346-6169

Michael & Vicky Poole
PO Box H
Malott, WA 98829

RE: Claim Number: 47-4r62-847
Policy Number: 47-GW-2878-3
Date of Loss: 07/17/2014
Loss Location: 21 3 Devils Rd, Malott WA 98829

Dear Mr. and Mrs. Poole,

Thank you for the documentation in regards to the total costs incurred on your dwelling extension (barn), which we received from your counsel during the discovery process.

Enclosed is a payment in the amount of \$ 4,614.96. This payment is based upon the following:

The policy limit for the dwelling extension is \$ 52,823.00, which has previously been paid. The amount over the policy limit is \$ 13,805.07. The total amount that was incurred in rebuilding the dwelling extension (barn), was \$ 66,628.07. The policy limit for the dwelling extension is \$ 52,823.00, which has previously been paid. The amount over the policy limit is \$ 13,805.07.

Based on the Increased Dwelling provision of your policy, if the amount you actually and necessarily spend to repair or replaced the damaged building structure exceeds the applicable limit of liability, 10% of the Option ID Dwelling limit is available for the Dwelling Extension. Based on the damage incurred for this loss, a total of \$4,614.96 is owed per your policy for the damage to your barn. I have included the applicable policy information for your review.

OPTIONAL POLICY PROVISIONS

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

If you have any additional information regarding your claim which has not been previously considered or if you desire any additional explanation regarding this matter, please contact me .

RECEIVED

APR 10 2017

BY: GSW

Sincerely,

Christina Jalali
Claim Specialist
State Farm Fire Claims
PO Box 106169
Atlanta, GA 30348
State Farm Fire and Casualty Company

Enclosure(s) Draft \$ 4,614.96
Summary of loss

Washington law requires inclusion of this notice on insurance application and claim forms: It is a crime to knowingly provide false, incomplete, or misleading information to an insurance company for the purpose of defrauding the company. Penalties include imprisonment, fines, and denial of insurance benefits.

CC: Lewis Brisbois Bisgaard @Smith LLP
1111 3rd Ave STE 2700
Seattle, WA 98101

Freeman Law Firm
1107 ½ Tacoma Ave S
Tacoma, WA 98402

LEWIS BRISBOIS BISGAARD & SMITH LLP

December 28, 2017 - 5:02 PM

Transmittal Information

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Respondent
Superior Court Case Number: 15-2-12947-9

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