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NO. 52913-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NATHANIEL D. CUMMING and JENNIFER CUMMING,
and the marital community comprised thereof,

Appellants

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Respondent,

and

BRIGHTON ENTERPRISES, INC. and ROSS KOLDITZ,

Defendants.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

There are two orders entered by the trial court from which the Appellants, Nathaniel Cumming and Jennifer Cumming (“the Cumming’s”), seek a reversal from the Court.

The Cumming’s owned a rental home (“the Property”) in Lacey, Washington. Nathaniel Cumming is an officer in the United States Army and the Cumming’s were stationed in Alabama at the time of the underlying property damage claim with their insurance company, United Services Automobile Association (“USAA”). The Cumming’s filed an insurance claim with USAA after their tenants had moved out and they discovered damage to the Property. USAA denied the insurance claim. The Cumming’s provided an Insurance Fair Conduct Act 20 Day Notice to USAA. After receiving no response to their Notice, the Cummings filed this lawsuit for insurance bad faith, breach of contract, and violations of the Insurance Fair Conduct Act and the Consumer Protection Act in the Superior Court for Thurston County. The lawsuit was also filed against the former tenant, Ross Kolditz, and his company, Brighton Enterprises, Inc. Those defendants were later dismissed from the action and are not parties to this appeal.

An order of default was properly entered against USAA when it failed to timely appear or defend. USAA and DKM failed to comply with

the statute regarding service of process on an insurance company, not as a result of unforeseen events, but simply because they failed to understand the service of process statute. The trial court set aside the order of default after finding that good cause existed on the grounds of due diligence and excusable neglect on the part of USAA and its counsel, DKM Law Group, LLP (“DKM”). Failure to understand the service of process statute by an insurance company and its attorney is not excusable neglect.

Affirming the trial court would set an unfortunate precedent that legal incompetence on the part of counsel is excusable neglect. Furthermore, it would set the legal standard lower for counsel representing insurance companies than for the insurance company themselves.

On August 21, 2018, the Cumming’s filed Plaintiff’s Motion for Partial Summary Judgment Against Defendant United Services Automobile Association for Breach of Contract, Bad Faith and Violation of the Insurance Fair Conduct Act (RCW 48.30.015) (“Cumming MSJ”). On October 19, 2018, USAA filed its Brief in Support of Defendant United Services Automobile Association’s Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment (“USAA MSJ”).

On November 16, 2018, the trial court heard oral argument on the cross-motions for summary judgment. In its motion, USAA raised new reasons for denying the claim that were not included in its denial of the

claim or in its answer to the lawsuit. On December 21, 2018, the trial court granted the USAA MSJ and dismissed the Cumming's claims. The trial court found that USAA was not estopped from raising new bases for denying the claim; that the denial was reasonable; and that the Cumming's failed to disclose the commercial or business use of the property after the insurance policy began.

The trial court should not have allowed USAA to modify or assert new bases for its denial as the information was admittedly available to it at the time of the original denial letter; was not asserted in a response to a 20 Day IFCA Notice; was not asserted in its answer and affirmative defenses; and was prejudicial to the Cumming's.

USAA denied the claim on the basis that methamphetamine contamination was a pollutant and therefore an excluded cause of loss even though the Washington courts have ruled otherwise with regards to rental properties and damage caused by tenants. USAA failed to properly investigate the claim and ignored damage to the property that was not methamphetamine related.

USAA argued, for the first time in the USAA MSJ, that the level of contamination was below the state mandated level for remediation and that therefore, there was no loss. There were issues of material fact that precluded summary judgment on the reasonableness of the denial as

USAA failed to investigate the claim and ignored damage due to vandalism, including the actual level of methamphetamine contamination and other damage to the Property.

USAA also asserted, for the first time, a defense of misrepresentation by the Cumming's. The timeline of events shows that this is impossible. USAA based its misrepresentation claim on the Cumming's insurance application but failed to provide the insurance application to the trial court which, even if provided, was inadmissible by statute because it was not incorporated as a part of the policy. USAA attempted to circumvent the statutory requirement by offering testimony of an employee that was self-serving, inadmissible with respect to the insurance application, and not sufficient to warrant entry of summary judgment.

The Cumming's appeal the trial court's orders and respectfully ask this Court to reverse the trial court's orders setting aside the default and entering summary judgment in favor of USAA, and to remand this action for further proceedings.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

1. The trial court erred when it entered its June 1, 2018 order setting aside the entry of default against USAA on the grounds of excusable

neglect and due diligence. Pursuant to RAP 10.3(b), the issues pertaining to this assignment of error are as follows:

- (i) Whether ignorance of the law regarding service of process by the attorney for an insurance company constitutes excusable neglect?
- (ii) Whether an attorney for an insurance company is held to a different standard than the insurance company itself?

2. The trial court erred when it entered its December 21, 2018 order granting summary judgment for USAA, and dismissing Cumming's complaint for breach of contract, insurance bad faith, violation of the Insurance Fair Conduct Act, and violation of the Consumer Protection Act. Pursuant to RAP 10.3(b), the issues pertaining to this assignment of error are as follows:

- (i) Whether USAA was precluded from introducing new or changed bases for denying insurance coverage after litigation began?
- (ii) Whether there were no issues of material fact regarding the reasonableness of USAA's denial of Cumming's insurance claim?
- (iii) Whether USAA met its burden of showing the absence of a material fact regarding the alleged misrepresentation by the

Cumming's when it circumvented the inadmissibility of the insurance application?

- (iv) Whether the insurance policy was void because the Cumming's failed to disclose the tenant's business use of the Property after the policy was issued?

III. STATEMENT OF THE CASE

A. Pre-Lawsuit

The Cumming's owned a rental home ("the Property") in Lacey, Washington. CP 123. Nathaniel Cumming is a Captain on active duty in the US Army and at the time of the claim was stationed in Alabama. CP 123. The Property was contaminated by methamphetamine and the damage was remediated removing all methamphetamine contamination. CP 123. This serves as a baseline for the presence of methamphetamine.

On September 29, 2015, immediately following the remediation, the Cumming's applied for rental property insurance with USAA. CP 236. On October 1, 2015, the Cumming's signed an exclusive leasing/listing agreement with Vanguard Realty. CP 299-305. On, October 26, 2015, Vanguard Realty leased the Property to Ross Kolditz. CP 307-324. In their complaint, the Cumming's alleged that Ross Kolditz

leased the property for use by his company Brighton Enterprises, Inc. CP 2-10.

The lease with Ross Kolditz ended on October 31, 2017. CP 123. Following the lease, the Cumming's had a friend do a walk-through and inspect the Property on November 13, 2017. CP 123-124. He found damage to the flooring and walls, including what appeared to be bleach stains on the carpet. CP 123. The Cumming's also had real estate agents showing the Property and they reported an odd smell in the house that was negatively affecting their ability to sell it. CP 124. Following the inspection, the Cumming's filed a claim with USAA on November 13, 2017. CP 124. USAA noted in its initial claim report on November 14, 2017, that the Cumming's reported a "strange smell in the house." CP 202. On November 28, USAA noted that the Cumming's stated that "[F]or full disclosure to sell the home they are going to need to report to buyer". CP 206. On December 18, 2017, USAA noted in its claim file that "the home had a smell, Stains on the carpet/bleach." CP 207.

The only investigation of the claim conducted by USAA was to have Bio Clean, Inc. perform methamphetamine testing. CP 199-200. Bio Clean, Inc. inspected the Property on November 16, 2017 and found the presence of methamphetamine residue in the Property. CP 200. USAA

denied the claim on December 20, 2017. CP 201; CP 160-161. The reason for the denial was:

“Your claim for removal and replacement of your drywall, all finishing products, flooring and duct systems or other repairs needed due to pollutants in your rental property is not covered because your policy does not cover the remediation or repair of damages caused by the discharge, dispersal, seepage, migration, release or escape of pollutants. Your policy further does not provide coverage for any diminution or reduction in value that would remain after damaged property is repaired or replaced.” CP 160.

The denial letter did not address the “strange smell in the house”, the “Stains on the carpet/bleach”, or the other damages observed during the walk-through. CP 160-161.

On January 30, 2018, the Cumming’s sent notice to USAA that they were making a claim for the unreasonable denial of coverage and payment of benefits pursuant to RCW 48.30.015(8). CP 492; CP 494. USAA did not respond to the Insurance Fair Conduct Act (“IFCA”) notice. CP 492.

B. Order of Default

On March 6, 2018, the Cumming’s filed this lawsuit in the Superior Court of Washington for Thurston County under Case No. 18-2-

01338-34. CP 1-11. On March 8, the Cumming's filed an Amended Summons. CP 12-14; CP 15-17. On March 9, 2018, the Office of the Insurance Commissioner ("OIC") accepted service of the Complaint and Amended Summons. CP 18.

On April 20, 2018, the Cumming's filed a Motion for Default and a default was entered by the trial court because 42 days had passed and USAA had neither appeared nor answered the lawsuit. CP 22-24; CP 25-27. On April 26, 2018, USAA appeared for the first time through its counsel DKM. CP 39. On April 26, 2018, the Cumming's counsel notified DKM that a default had been taken against USAA. CP 47; CP 59.

DKM responded by stating that USAA was not required to file an answer within 40 days after acceptance of service by the OIC. CP 47; CP 61. The attorney from DKM, Joshua Kastan, informed the attorney for the Cumming's by telephone and email that USAA had 40 days to respond to the summons and complaint from the date that the OIC served the summons and complaint on his client. CP 47; CP 61. Mr. Kastan attached a "Notice of Service of Process" to the email which he relied upon for his argument that service of process was not on the OIC but on the registered agent of his client. CP 65. The Notice of Service of Process stated that the summons and complaint was "Originally Served On: WA Insurance

Commissioner on 03/09/2018". CP 65. The Cumming's attorney sent a letter to Mr. Kastan pointing out his errors on April 30, 2018. CP 67-68.

On May 2, 2018, USAA filed Defendant United Services Automobile Association's Motion to Set Aside Entry of Default and for Leave to File Answer and Other Papers. CP 28-37.

In its Motion to Set Aside Default, USAA failed to mention or attach the email it sent to the Cumming's attorney, or the response letter, which clearly showed that it did not understand the service of process statutes. CP 47-48. On May 8, 2018, the Cumming's filed Plaintiffs' Brief in Opposition to Defendant United Services Automobile Association's Motion to Set Aside Entry of Default and for Leave to File Answer and Other Papers. CP 73-86. The trial court heard argument of the motion on May 11, 2018. 1 RP 1-10.

The Cumming's appeal the trial court's June 1, 2018 order granting USAA's motion. CP 637-638.

C. Cross-Motions for Summary Judgment

On August 21, 2018, the Cumming's filed the Cumming's MSJ. CP 112-121. The basis for the Cumming's MSJ was the reason provided for the denial in the denial letter from USAA.

On October 19, 2018, USAA filed the USAA MSJ. CP 175-197.

In the USAA MSJ, USAA abandoned the pollutant exclusion as the basis for its denial and provided three new bases for denying the claim:

- (1) That the Cumming's failed to disclose to USAA that the Property was used as an assisted living facility and therefore, the policy was void;
- (2) That the level of contamination did not "trigger a duty to remediate"; and
- (3) That the level of "methamphetamine residue was so low that it could not have been the result of a methamphetamine laboratory" therefore, there was no act of vandalism. CP 179-180

These were new reasons for the denial and not included in the denial letter or USAA's Answer to Plaintiff's Complaint. CP 160-161; CP 95-111.

USAA alleged that the Cumming's misrepresented the use of the Property in their application for insurance. At no time did USAA provide the alleged application to the trial court. It relied solely on the declaration of an employee working as an underwriter. "In their application, the Cumming's confirmed that the Subject Property was not being used for farming, business, or commercial purposes." CP 235-237.

USAA filed a notarized copy of the entire insurance policy with the trial court and the application was not included as a part of the policy. CP 242-296.

USAA stated that the application for insurance occurred on September 29, 2015. CP 236. It filed with the trial court the Exclusive Lease/Listing Agreement between the Cumming's and Vanguard Realty that is dated October 1, 2015. CP 299-305. It also filed the lease/rental agreement between Vanguard Realty and Ross Kolditz dated October 26, 2015. CP 307-324. Nevertheless, USAA argued that the Cumming's knew on September 29, 2015 that Vanguard Realty, who they would not retain for another 2 days, would 26 days later lease the Property to Ross Kolditz, an unknown individual, who would later occupy the Property and use it for his business.

On November 16, 2018, the trial court heard oral argument on the cross-motions for summary judgment. 2 RP 1-35. The trial court denied the Cumming's MSJ and granted the USAA MSJ dismissing the Cumming's claims, stating that:

“The Court believes that there are factual issues but that those factual issues do not preclude the Court from addressing some of these issues as a matter of law.

The Court finds on this record as a matter of law that USAA reasonably denied the Cummings' claim, and, therefore, because of that, combined with the failure to disclose the commercial or business use of the premises after the insurance policy began, that the four claims against USAA should be dismissed as a matter of law.

The Court concludes that USAA is not estopped from modifying its reasons for denial, and so the Court is basing its ruling also on the reasons put forth by USAA for denial, some of which have not been factually contested by the plaintiff, some of which have been. Again, I want to reiterate that there are issues of fact in this case that the Court is not resolving. However, the Court believes that USAA did reasonably deny the claim as a matter of law based upon uncontested facts.” 2 RP 32-33.

The Cumming's appeal the trial court's December 21, 2018 order and respectfully ask this Court to reverse the trial court's order entering summary judgment in favor of USAA, and to remand this action for further proceedings.

IV. ARGUMENT

A. Order of Default

1. Summary of Argument

An order of default was entered by the trial court when USAA failed to answer or otherwise appear in the lawsuit. The failure to answer was due to legal incompetence on the part of DKM. DKM was ignorant of, or did not understand, the clear language of the statute governing the date of service on an out-of-state insurance company.

USAA moved to set aside the default and argued that DKM's error was excusable neglect. Failure to comply with a statutorily imposed deadline due to an attorney's ignorance of the law, or his office's lack of organizational procedures, does not constitute excusable neglect. The same conduct by USAA itself would not constitute excusable neglect. USAA's counsel should not be held to a lower standard than its client. The trial court erred when it set aside the default on the grounds that USAA's failure to answer was due to excusable neglect.

2. Standard of Review

An appellate court ordinarily reviews the decision on a motion to set aside a default order (CR 55) for an abuse of discretion. *Leen v. Demopolis*, 62 Wash.App. 473, 478, 815 P.2d 269 (1991), *rev. denied*, 118 Wash.2d 1022, 827 P.2d 1393 (1992) (citing *White v. Holm*, 73 Wash.2d 348, 438 P.2d 581 (1968)). "Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable." *Prest v. American*

Bankers Life Assur. Co., 79 Wn.App. 93, 97, 900 P.2d 595 (1995), *rev. denied*, 129 Wn.2d 1007 (1996).

The trial court's decision "is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

3. USAA's Failure to File a Timely Answer Was Not Excusable Neglect

a. USAA is Accountable for the Actions of its Attorneys

The trial court entered an order of default against USAA when it failed to timely appear, plead or otherwise defend the lawsuit filed by the Cumming's. USAA made no formal or informal appearance in the action until after the default was entered by the trial court. A few days after the entry of default, USAA appeared in the lawsuit for the first time. It moved a few days later to set aside the default under CR 55(c)(1) which provides that "For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b)."

Generally, default judgments are not favored; however, it also true that litigants must comply with the court rules. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1989).

In order to set aside an order of default, USAA was required to show excusable neglect and due diligence. *Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.* 63 Wn. App. 266, 271, 818 P.2d 618 (1991).

USAA alleged that its delay in answering the complaint was not due to its own mistake, but the mistake of its attorneys, DKM. This is a distinction without a difference. USAA is bound by the actions of its attorneys to the same extent that it is by its own actions.

Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity. The “sins of the lawyer” are visited upon the client. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 679 (2002).

It is well-established that a client is bound by the actions of its chosen attorney. Insurance companies are not unsophisticated clients. They retain counsel and monitor legal cases on a continuous basis. USAA voluntarily chose DKM and it is accountable for its acts and omissions, in addition to its own. The focus of the analysis is on whether the neglect of USAA and DKM was excusable. *Pioneer Inv. Servs. Co. v. Brunswick*

Assocs. Ltd. P'ship, 507 U.S. 380, 396-97, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993).

b. The Failure to Answer was due to Professional Incompetence

USAA alleged that the failure to answer was due to a “calendarling mistake” on its part. In its filings with the trial court, DKM referred to this as an “unfortunate calendarling issue”¹; “innocent mistake”²; “good faith calendarling mistake”³; “unintentional, innocent, *bona fide* calendarling mistake”⁴; and “good faith mistake”⁵. It was none of the above. The failure to file and serve an answer to the summons and complaint was due to professional incompetence. USAA, and DKM, its legal counsel, did not understand the statutes regarding service of process upon an insurance company in the state of Washington. USAA admits that it used “the date of receipt by USAA’s registered agent to calculate the response date, as opposed to the date of service on the OIC.”⁶

First, the registered agent for service of process on USAA in the state of Washington is the Office of the Insurance Commissioner. RCW 48.05.200(1). Second, USAA was required to appoint a “person to whom

¹ Motion to Set Aside, page 1, line 24.

² Motion to Set Aside, page 2, line15; page 3, line15; .

³ Motion to Set Aside, page 7, lines 20-21.

⁴ Motion to Set Aside, page 8, lines 2-3.

⁵ Motion to Set Aside, page 8, lines 11-12.

⁶ Motion to Set Aside, page 8, lines 5-7.

the commissioner must forward legal process so served upon him or her.” RCW 48.05.200(2). Third, USAA was not “required to appear, plead, or answer until the expiration of forty days after the date of service upon the commissioner.” RCW 48.05.200(5). The statute explicitly states that service of process is on the insurance commissioner and that the time to appear or defend the lawsuit started on the date of service on the insurance commissioner.

The email from DKM dated April 26, 2018 stated that “Per the attached, USAA’s registered agent in the state was served with the notice of this lawsuit on March 19. The forty days from that date does not expire until this coming Saturday. We filed our Answer and Jury Demand with the Court earlier today, prior to the expiration of that time.” Even the attached Notice of Service of Process relied upon by USAA stated “Originally Served On: WA Insurance Commissioner on 03/09/2018.”⁷ There was no calendaring mistake; the mistake was a lack of knowledge of the applicable statutes governing service of process on USAA.

c. USAA’s Failure to Answer is Not Excusable Neglect

USAA’s failure to appear, answer, or otherwise defend is not excusable. Insurance companies are expected to respond to legal process that is served upon them. “While certainly Banker’s failure to answer was

⁷ Decl. of Bonrud, Exhibit F.

neglect, it is not excusable. It is an important part of the business of an insurance company to respond to legal process served upon it.” *Prest at 99-100.*

Due diligence is not a substitute for excusable neglect. “The most that can be said is that Bankers acted with due diligence after it learned that the default judgment had been entered. That does not, however, provide it with a defense or excuse its neglect.” *Id.*

USAA is an insurance company and it is an important part of its business to respond to legal process served upon it. It is no less important for legal counsel to respond to legal process that was served on its client.

The courts have considered eight factors when determining whether a delay resulted from excusable neglect.

“Eight factors assist us in determining whether a delay resulted from excusable neglect: (1) The prejudice to the opponent; (2) the length of the delay and its potential impact on the course of judicial proceedings; (3) the cause for the delay, and whether those causes were within the reasonable control of the moving party; (4) the moving party's good faith; (5) whether the omission reflected professional incompetence, such as an ignorance of the procedural rules; (6) whether the omission reflected an easily manufactured excuse that the court could not verify; (7) whether the moving party had failed to provide for a consequence that was readily

foreseeable; and (8) whether the omission constituted a complete lack of diligence.” *Keck v. Collins*, 181 Wn.App. 67, 84, 325 P.3d 306, (2014); *aff’d* 184 Wn.2d 358, 357 P.3d 1080 (2015) (quoting 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 48:9, at 346 (2d ed. 2009) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993))).

The *Keck* factors weigh heavily in favor of a finding that there was no excusable neglect. The cause for the delay in answering was completely within the control of USAA. The failure to answer or otherwise appear reflects professional incompetence because it was due to ignorance of the relevant statutes. USAA, as the moving party, did not exhibit good faith when it failed to inform the trial court of the actual reason for the failure to appear or defend. Instead, DKM made claims that it was an innocent mistake or calendaring error when in fact it was due to ignorance of the relevant service statutes. Failing to provide the trial court with the emails and letters which showed the actual reason for the failure to appear or defend was not done in good faith.

USAA also failed to provide for a consequence (default) that was readily foreseeable; and USAA’s failure to answer or otherwise appear constituted a complete lack of diligence. A failure to appear, answer or

otherwise defend a lawsuit by legal counsel or an insurance company due to ignorance of the relevant statutes is not excusable neglect.

It is well known that pro se litigants are held to the same standards as attorneys. *Edwards v. Le Duc* 157 Wn.App. 455, 460, ¶13, 238 P.3d 1187 (2010). At a minimum, the reverse must be equally true. To hold attorneys to a lower standard than pro se litigants would seem contrary to that principle.

The trial court abused its discretion when it set aside the entry of default based on untenable grounds when it found that the failure to appear or answer was due to excusable neglect. The Court should reinstate the default and remand the case for further proceedings consistent with the order of default.

B. Motions for Summary Judgment

1. Summary of Argument

The Cumming's filed a claim for property damage with their insurance carrier, USAA. During the course of the claim, USAA was aware that the Cumming's claimed damage to the carpet and that there was a strange smell in the house. The Cumming's suspected that methamphetamine was present in the house due to the smell in the house. Nevertheless, USAA did not inspect the property. The only investigation conducted by USAA was methamphetamine testing. USAA did not

physically inspect the house or have any other testing done to determine the cause of loss. The methamphetamine testing was positive for methamphetamine but it was below the state mandated level for mandatory remediation. Nevertheless, the Cumming's suffered a loss, as they would be required to disclose the presence of methamphetamine prior to a sale of the home. In its denial letter, the only basis offered by USAA for the denial of the Cumming's claim was that there was no coverage for pollutants under the policy.

USAA failed to properly investigate the claim but was aware at the time that it denied the claim, that the tenant had used the property for business or commercial purposes. It was also aware of the presence and level of methamphetamine contamination and that there was additional damage to the property. The denial of the claim, however; was solely on the basis that pollutants were not covered under an exclusion in the policy. USAA did not deny the claim on the basis that there was no vandalism due to the level of contamination, or that the Cumming's had made an alleged misrepresentation in their application for insurance.

The Cumming's gave USAA notice under the Insurance Fair Conduct Act that they were making a claim for the unreasonable denial of coverage and failure to pay the benefits due and owing under the policy. USAA did not respond.

The Cumming's then filed this lawsuit. In its answer and affirmative defenses, USAA did not raise a defense regarding the level of contamination, that vandalism required proof of a methamphetamine laboratory, or that Cumming's had misrepresented the use of the house in their application; it only raised these defenses in the USAA MSJ, which was filed almost two months after the Cumming's MSJ was filed.

After ruling that USAA was not estopped from modifying or alleging new bases for its denial, the trial court granted summary judgment in favor of USAA based on two findings. First, the trial court found that the denial of the Cumming's claims was reasonable, and second, that the Cumming's failed to disclose the commercial or business use of the property after the insurance policy began.

USAA failed to meet its burden of showing that there was no issue of material fact regarding the reasonableness of its denial. It failed to properly investigate the Cumming's claim by not actually inspecting the property; overlooking or ignoring the damages that were claimed by the Cumming's; and determining that the Cumming's suffered no damage from vandalism due to methamphetamine contamination because the level of contamination was below the state mandated remediation level. There are questions of material fact regarding the reasonableness of the denial which preclude summary judgment.

USAA also alleged that the Cumming's failed to disclose in their application for insurance that the Property would be used for business purposes therefore, they knowingly or intentionally made material misrepresentations or false statements to USAA. Summary judgment is generally not warranted when it is necessary to show intent or knowledge if these are questions of material fact. The only evidence offered by USAA in support of this claim was the declaration of its employee, Sandra Sausman, and her review of the underwriting file. USAA did not offer the application itself, if it existed, as the best evidence of what it contained. The information contained within the insurance application was solely within the knowledge of USAA; therefore, summary judgment was inappropriate. At a minimum, the Cumming's did not have an opportunity to cross-examine Ms. Sausman in front of a jury regarding the credibility of her testimony. Even if offered, the application was inadmissible. Allowing USAA to circumvent the statutory requirements regarding the admissibility of an insurance application, by offering testimony of an employee as to the contents of the application, is not allowed and certainly does not support entry of summary judgment.

2. Standard of Review

The appellate courts review summary judgment decisions de novo, engaging in the same inquiry as the trial court, to determine if the moving

party is entitled to summary judgment as a matter of law and if there is any genuine issue of material fact requiring a trial. *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 281, 313 P.3d 395 (2013). A trial court's factual findings are superfluous on summary judgment and are entitled to no weight. *Chelan Cnty. Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987). All facts, and reasonable inferences therefrom, must be viewed most favorably to the party resisting the motion, and summary judgment is properly granted only "if reasonable minds could reach only one conclusion from the evidence presented." *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007). Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan Cnty. Deputy Sheriffs' Ass'n*, 109 Wn.2d at 295.

3. Shifting the Burden of Proof

Under CR 56(c), a summary judgment can be rendered only if the various matters submitted to the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether the nonmoving party would, at the time of trial, have the burden

of proof on the issue concerned. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010); *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960); "The burden is on the moving party to demonstrate that there is no issue as to a material fact, and the moving party is held to a strict standard." *Scott v. Pac. W Mtn. Resort*, 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992). The opposing party does not need to submit affidavits or responding materials unless the movant meets its burden. *Hash v. Children's Ortho. Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988); *Preston*, 55 Wn.2d at 682-83. If the movant does not meet its burden, summary judgment may not be entered, regardless of whether the opposing party has submitted responding materials. *Hash*, 110 Wn.2d at 915; *Jacobsen v. State*, 89 Wn.2d 104, 110-11, 569P.2d1152 (1977).

4. "Mend the Hold" Doctrine

The "Mend the Hold" doctrine prevented USAA from asserting new reasons for denying the claim when it had the facts in its possession at the time of the denial, failed to assert those reasons for the denial, and the Cumming's were prejudiced by the failure to assert those reasons. *Bosko v. Pitts & Still, Inc.*, 75 Wn.2d 856, 864, 454 P.2d 229 (1969). USAA had all of the facts it relied on in its Motion for Summary Judgment at the time

of the claim denial. “An insurer is charged with the knowledge which it would have obtained had it pursued a reasonably diligent inquiry.” *Id.*

USAA admits that prior to denying the claim it knew the levels of methamphetamine contamination; it had the information regarding the use of the Property by an assisted living company; and it had the insurance application. USAA not only failed to raise these defenses in its original denial letter but it failed to raise them in response to the IFCA 20 Day Notice. During that time period, the insurer has an opportunity to “resolve the basis for the action”. RCW 48.30.015(8)(b).

USAA also failed to raise any of these defenses in its answer to the complaint. These defenses were raised for the first time in the USAA MSJ, nearly two months after the Cummings filed the Cumming MSJ. The Cumming MSJ focused on the reason for the denial of the claim in the denial letter. In an analogous case, the US District Court for the Western District of Washington, applying Washington law, stated:

“Had there been additional bases for rescinding Plaintiff’s coverage, American General should have notified Plaintiff of them at this stage, following its extensive period of review. Instead, Defendants failed to do so until well after litigation began and they had answered Plaintiff’s complaint, formally asserting them only upon summary judgment. See, e.g., Dkt. # 10, p. 23, ¶¶ 7-10. Plaintiff is clearly prejudiced by

Defendants' shifting grounds in that she brought her complaint on the basis of American General's denial letter and prepared her case with the understanding that her claim was denied solely due to alleged failure to disclose joint or musculoskeletal disorders.” *Karpenski v. American General Life Cos., LLC*, 999 F.Supp.2d 1235, 1245-6 (W.D.Wash. 2014).

The facts in this lawsuit are analogous with *Karpenski*; USAA did not offer these bases for denying the Cummings’ claim in its denial letter; in a response to the IFCA notice; or in its answer. It waited until after the Cumming’s filed the Cumming MSJ before asserting these reasons for the denial in the USAA MSJ.

5. Reasonableness of USAA’s Denial

USAA relies on the requirements for remediation found in the Washington Administrative Code to argue that its denial was reasonable. The question is not what is required by the WAC, the question is what is required by the insurance policy. The court in *Graff v. Allstate Ins. Co.*, 113 Wn.App. 799, 804, 54 P.3d 1266 (2002) *rev. denied*, 149 Wn.2d 1013, (2003) made this clear when it stated:

“But neither Graff, the City of Tacoma, the environmental firm, nor the health department may determine the cause of Graff’s loss. Rather, the court characterizes the peril causing the loss. *Kish v. Ins. Co. of N. Am.*, 125 Wash.2d 164, 170, 883 P.2d 308 (1994).”

Contamination by methamphetamine was vandalism as determined by the *Graff* court. In *Bowers v. Farmers Ins. Exchange*, 9 Wn. App. 41, 47, 991 P.2d 734 (2000), cited with approval in *Graff*, the court determined that damage from mold as the result of a marijuana grow operation was vandalism. The court in *Bowers* determined that vandalism was the efficient proximate cause of the loss. The operative facts in both decisions is that the tenants “acted in conscious or intentional disregard” of the landlord’s property rights. *Graff*, at 805. That is the case here.

USAA’s claim that the level of contamination determines coverage is actually conflating coverage with damage. The level of contamination does not determine coverage. The court in dealt with the level of contamination when it stated:

“Allstate contends that *Bowers* is not controlling because *Graff*’s tenant caused no visible damage to the house and no physical damage preceded the methamphetamine related damage. These arguments are unpersuasive. The tenant's methamphetamine lab released hazardous vapors into the house. Moreover, visibility is not the measure of vandalism; the chemical release was measurable, even after it had contaminated the interior of the house. If the chemicals had never been released or mixed, then the contamination would not have occurred. Thus, *Bowers* is controlling.” *Graff* at 806.

USAA has pointed to nothing in the insurance policy that limits coverage to statutory requirements for remediation. The insurance policy is a contract which provides for indemnification of the insured. RCW 48.01.040 **Insurance defined** states:

Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.

RCW 48.11.040 **“Property insurance” defined** states:

"Property insurance" is insurance against loss of or damage to real or personal property of every kind and any interest therein, from any or all hazard or cause, and against loss consequential upon such loss or damage.

The insurance policy does not limit its coverage to a level of damage requiring remediation as determined by the Revised Code of Washington or the Washington Administrative Code. The Cumming’s suffered damage to real property due to the contamination.

The policy states in SECTION I – **LOSSES WE COVER:**

COVERAGE A – DWELLING and COVERAGE B – OTHER STRUCTURES

We insure against **“sudden and accidental”**, direct physical loss to tangible property described in SECTION I – PROPERTY WE COVER –COVERAGE A and B unless excluded in SECTION I – LOSSES WE DO NOT COVER. CP 271.

There is nothing in above quoted coverage section of the insurance policy that limits coverage to damage above the remediation levels as determined by state regulations. “Cover” or “coverage” are not defined in the insurance policy; therefore, the court should look to the plain, ordinary and popular meaning of the term.

"Courts interpret insurance contracts as an average insurance purchaser would understand them and give undefined terms in these contracts their 'plain, ordinary, and popular' meaning." *Kish*, 125 Wash.2d at 170, 883 P.2d 308 (quoting *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869, 877, 784 P.2d 507, 87 A.L.R.4th 405 (1990)); accord *State Farm Gen. Ins. Co. v. Emerson*, 102 Wash.2d 477, 480, 687 P.2d 1139 (1984)." *Bowers*, at 45.

A common definition of coverage is “all the risks covered by the terms of an insurance contract”. Merriam-Webster’s Collegiate Dictionary 11th Ed. The Washington courts have also defined the term coverage:

“Black's Law Dictionary (5th ed. 1979) gives the following definition of the term coverage: "In insurance, amount and extent of risk

covered by insurer." *Churchill v. New Hampshire Ins. Co.*, 68 Wn.App. 564, 569, 844 P.2d 459, (1993).

USAA has cited to nothing in the policy which excludes coverage if the amount of contamination is below the amount requiring remediation under the Washington Administrative Code. Regarding coverage, the question is whether the insurance policy written by USAA covered the risk of vandalism caused by methamphetamine contamination. The courts in *Bowers* and *Graff* answered yes to this question.

At a minimum, taking the alleged facts in the light most favorable to the Cummings, USAA has failed prove that there are no material issues of fact regarding the reasonableness of its denial and that it is entitled to judgment as a matter of law.

a. Failure to Investigate the Claim

USAA was required to act in good faith in its relations with the Cummings, including a duty to reasonably investigate the claim and state the specific grounds for denial of the claim.

“As the Court of Appeals noted, the unfair practices listed in WAC 284-30 include misrepresenting pertinent facts and refusing to pay without a reasonable investigation (WAC 284-30-330), failure to disclose all relevant policy provisions (WAC 284-30-350), and failure to state the

specific grounds for denial of a claim (WAC 284-30-380). *Coventry Assocs.*, 86 Wash.App. at 848-49, 939 P.2d 1245.” *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 276, 961 P.2d 933 (1998).

USAA never inspected the Property after the claim was made by the Cummings. USAA’s own records show that in the initial claim report on November 14, 2017, it was aware that there was a “strange smell in the house”. CP 202. It was also aware of “a GC that was called for an estimate”. CP 202. On December 18, 2017, prior to denying the claim, USAA noted in their claim file that “NI stated the home had a smell, Stains on the carpet/bleach.” CP 207.

USAA failed to investigate the claim to determine the extent and the cause of the “Stains on the carpet/bleach”, or the cause of the “strange smell in the house”. The only investigation of the claim conducted by USAA was testing for methamphetamine by BioClean, Inc. which was originally contacted by the Cummings. USAA tested only for methamphetamine, it did not test for anything else. During the walk-through of the Property on November 13, 2017, damage to the walls, flooring and stains on the carpet from what appeared to be bleach were found. CP 122-123; CP 137-145. USAA never inspected the Property to determine the cause of the smell, the stains on the carpet, or if there were any additional damages. USAA did not investigate or determine the cause

of the smell, nor did it determine the cause of the stains on the carpet. Instead it denied the Cumming's claim on the basis that "pollutants in your rental property is not covered because your policy does not cover the remediation or repair of damages caused by the discharge, dispersal, seepage, migration, release or escape of pollutants." USAA's denial letter failed to address the stains on the carpet or strange smell in the Property. It also failed to state specific grounds for denying the claim on the basis of the level of contamination because there were none. USAA forced the Cummings to become the adjusters of their own claim, while it completely abdicated its contractual and statutory obligation to fully and fairly investigate the claim.

"The insurer is only required to fulfill its contractual and statutory obligation to fully and fairly investigate the claim. The problem arises when the insurer fails to investigate, in bad faith, thereby placing the insured in the difficult position of having to perform its insurer's statutory and contractual obligations." *Coventry* at 279.

USAA did not fully and fairly investigate the Cummings' claim. USAA claimed in its Motion for Summary Judgment that there is no evidence that a methamphetamine laboratory was in the Property. Although that statement is clearly false because there is evidence of methamphetamine residue, did it investigate to determine if that level of

methamphetamine residue was consistent with the presence of a methamphetamine laboratory? No it did not. Did USAA investigate the claim at all? If it had, it would have determined the cause of the strange smell and stains on the carpet. It would also have determined the cause and extent of other damages to the Property found during the walk-through. It then would have been obligated to determine if the damages were covered causes of loss under the policy and either pay for the damages or provide the Cummings with specific grounds for the denial of their claim. It failed to do so.

6. Misrepresentation/Failure to Disclose

USAA alleges that the Cumming's made a material misrepresentation to USAA when they failed to disclose in their application for insurance that the Property would be used as an assisted care facility. USAA claims that this is a material misrepresentation.

RCW 48.18.090(1) states that:

“Except as provided in subsection (2) of this section, no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his or her behalf, shall be deemed material or defeat or avoid the contract or prevent it attaching, unless the misrepresentation or warranty is made with the intent to deceive.”

USAA was required to show that there was a material misrepresentation and that it was made with intent to deceive. This claim also fails for numerous reasons.

1. Best Evidence Rule

USAA states that Cummings failed to disclose in their application for insurance that the property would be rented to an assisted care facility. USAA filed the Declaration of Sandra Sausman stating that “In their application, the Cummings confirmed that the Subject Property was not being used for farming, business or commercial purposes.” CP 236. No copy of the alleged application was produced in support of the USAA MSJ. The alleged contents of the application cannot be offered through the declaration; the application itself must be produced.

“It is a fundamental principle of the law of evidence that ‘in proving the terms of a writing, where such terms are material, the original writing must be produced, unless it is shown to be unavailable for some reason other than the serious fault of the proponent. C. McCormick, Law of Evidence § 196 (1954). As stated in *Gordon v. United States*, 344 U.S. 414, 421, 73 S.Ct. 369, 97 L.Ed. 447 (1953), the wisdom of the best evidence rule rests on the fact that a document is a more reliable, complete, and accurate source of information as to its contents and

meaning than anyone's description.” *State v. Modesky*, 15 Wn.App. 198, 200-1, 547 P.2d 1236 (1976). *See also*, ER 1002.

USAA failed to produce the alleged application on which its entire claim of misrepresentation is based. Instead, it offered the testimony of Sandra Sausman regarding the contents of the alleged application. The knowledge of the contents of the application is solely within the control of USAA. Where material facts are solely within the control of the moving party, the case should proceed to trial so that the non-moving party can disprove such facts by cross-examination. *Hulse v. Driver*, 11 Wn.App. 509, 517, 524 P.2d 255 (1974), *review denied*, 84 Wn.2d 1011 (1974).

A genuine issue as to the credibility of the evidence supporting the claim of misrepresentation requires denial of the motion for summary judgment. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

2. The Insurance Application is Not Admissible

In order to be admissible, the application must be attached and explicitly made a part of the insurance policy.

RCW 48.18.080(1) states:

“No application for the issuance of any insurance policy or contract shall be admissible in evidence in any action relative to such policy or contract, unless a true copy of the application was attached to or

otherwise made a part of the policy when issued and delivered. This provision shall not apply to policies or contracts of industrial life insurance.”

USAA did not offer the alleged application into evidence. It offered no evidence that the application was “attached to or otherwise made a part of the policy when issued and delivered.” It attempted to circumvent the requirements of RCW 48.18.080(1) by offering the testimony of an employee who claims to have reviewed the inadmissible application. USAA cannot make the application admissible by offering the testimony of one of its employees regarding the contents of the application. The application is not admissible and cannot be relied upon to prove misrepresentation by the Cumming’s. USAA fails to show how the Cumming’s could meet their “duty to examine the application to ensure their answers to the questions were correctly recorded”, if the application was not made a part of the policy when issued and delivered. USAA did not meet its burden of proving that a misrepresentation even took place, let alone that it was material or done with the intent to deceive.

3. Timeline and Logic

Even if the application was produced and admissible, it does not support the claims of USAA regarding misrepresentation. USAA admits the following in the USAA MSJ and supporting declarations:

1. The Cummings applied for a Renter's Policy with USAA on or about September 29, 2015.

2. The Cummings signed an Exclusive Lease/Rental Listing Agreement with Vanguard Realty on or about October 1, 2015.

3. That Vanguard Realty subsequently leased the Property to Ross Kolditz, an individual, on or about October 26, 2015.

4. At some point after October 26, 2015, Ross Kolditz used the Property for his assisted care business, Brighton Enterprises, Inc.

USAA offered no evidence showing that the Cummings are clairvoyant and able to know in advance that their agent, retained 2 days after applying for insurance, would rent the property 25 days later, to an individual who would at some later date use the property for business purposes. Simple logic indicates that USAA's claim that the Cummings misrepresented the use of the property in their application makes no sense. It was impossible for the Cumming's to have misrepresented the business use of the property in their application with USAA.

5. The Trial Court Ruling

The trial court ruling was inconsistent with the arguments put forth by USAA in its Motion for Summary Judgment. The trial court ruled that the Cumming's failed "to disclose the commercial or business use of the premises after the insurance policy began" and that it related to the

“breach-of-contract claim”. The argument by USAA was that the Cumming’s had knowingly or intentionally misrepresented the business use of the Property in their application for insurance.

USAA offered no evidence as to when the Cumming’s learned the Property was being used for commercial purposes prior to filing the insurance claim, or that they had a duty to inform USAA when they learned of the business use. USAA knew about the tenant’s business use at the time it denied the claim, yet did not deny the claim on that basis.

In order for the Cumming’s to breach a duty to disclose the business use of the Property, there had to be a duty to disclose it, and the Cumming’s had to know that the duty existed. The only evidence offered by USAA is the declaration of Sandra Sausman in which she states that “[P]ursuant to USAA’s underwriting policies and procedures, USAA does not issue Rental Property Insurance Policies pertaining to residential properties that will be used as business properties.” The underwriting policies and procedures are known only to USAA, not the Cumming’s. USAA offered nothing to show what questions it asked of the Cumming’s in the application process.

There is no provision in the insurance policy which states that the property could not be used for commercial or business purposes by a tenant. USAA drafted the policy and the Cumming’s had no role in

drafting it. If USAA wished to exclude coverage for the business use of a Property by a tenant, it needed to expressly state it in the policy. *Patriot General Insurance Co. v. Gutierrez*, 186 Wn.App. 103, 112, ¶23, 344 P.3d 1277 (2015). The policy does allow USAA to cancel the policy “if the risk has changed substantially since the policy was issued.” The policy does not; however, include any provision describing what constitutes a substantial change in the risk, or requiring that the insured inform USAA of a change in the risk. The policy does not allow USAA to void the policy for a substantial change in the risk, or deny a claim on that basis; it only allows it to cancel the policy with at least 45 days notice. CP 291.

USAA presented no admissible evidence to the trial court that the Cumming’s intentionally concealed or misrepresented anything in their application for insurance or in their insurance claim.

USAA should be estopped from modifying or raising new bases for denying the Cumming’s claim, but even if the Court entertains the new bases for the denial, USAA has failed to meet the standard for entry of summary judgment. The Court should reverse the order granting summary judgment.

V. ATTORNEY’S FEES

The Cumming’s request an award of reasonable attorney’s fees, expenses and costs on this appeal pursuant to RAP 18.1. The Cumming’s

base this request on the Consumer Protection Act (RCW 19.86.090); the Insurance Fair Conduct Act (RCW 48.30.015); and *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

VI. CONCLUSION

The trial court erred in granting USAA's motion to set aside the default and its motion for summary judgment. The Court should reverse the trial court's June 1, 2018 order setting aside the order of default against USAA and order that the default be reinstated. The Court should also reverse the trial court's December 21, 2018 order insofar as it granted USAA's Motion for Summary Judgment and erroneously dismissed the Cumming's claims against USAA, and remand this case for further proceedings.

Dated this 22nd Day of July, 2019

LAW OFFICES OF NEAL BONRUD PLLC



By _____
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CERTIFICATE OF SERVICE

I certify that I caused one copy of the foregoing Opening Brief of Appellants to be served on the following parties of record and/or interested parties by e-mail delivery to the below named attorney as follows:

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Dated this 22nd Day of July 2019, at Issaquah, Washington.



Neal E. Bonrud Jr.

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