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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.

REPLY BRIEF OF APPELLANTS

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I. SUMMARY JUDGMENT ORDER

A. USAA is Prevented from Asserting Additional Bases for Denying Cumming's Claim

USAA was required to state the specific grounds for the denial of the claim. WAC 284-30-380. It now relies on bases for the denial which it did not state in its denial of the claim. USAA should not be allowed to assert new bases for its denial of the claim. USAA argues that it “never modified its original basis for the denial.” (Brief of Respondent, hereinafter “Respondent’s Brief”, p. 31). This is false. In fact, USAA has completely abandoned the original basis for the denial which was that “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.”

USAA offered three entirely new bases for its denial in its motion for summary judgment: (1) the policy was void for failure to disclose its use as an assisted living facility; (2) the level of contamination did not trigger a duty to remediate; and (3) no act of vandalism occurred because the level of contamination was so low it could not have been the result of a methamphetamine laboratory. These bases for denial were not offered in USAA’s denial letter, a response to the IFCA Notice, or its Answer to the

Complaint. USAA did not argue the original basis for its denial in its motion for summary judgment. The Cumming's were clearly prejudiced by USAA's shifting grounds for the denial as they prepared their case, brought their complaint, conducted discovery, and brought a motion for partial summary judgment, on the basis of USAA's denial letter. The "Mend the Hold" doctrine prevents USAA from raising these new defenses. *Karpenski v. American General Life Cos., LLC*, 999 F.Supp.2d 1235, 1245-6 (W.D.Wash. 2014).

USAA had all of the information regarding these new bases for denial at the time it issued its denial letter. It failed to include these bases and should not be allowed to do so to the prejudice of the Cumming's. The case inaccurately cited by USAA actually supports the position of the Cumming's.

Specialty Surplus Ins. Co. v. Second Chance, Inc. C03-cv-00927-JCC (W.D. Wash. August 23, 2006) relates to a defense of an insured under a reservation of rights. The court found that the insurance company's "reference to "reasonable reliance" impermissibly shifts the burden of proof regarding harm in a bad faith claim back to the insured/third-party assignee. The equitable estoppel analysis (in which "reasonable reliance" plays a role) is entirely separate and distinct from the bad faith analysis. In order to succeed in rebutting the presumption of

harm, Specialty Surplus must show by a preponderance of the evidence that its failure to notify Mr. Moeller of the scope of employment (sic) did not harm or prejudice him.” *Specialty Surplus Ins. Co. v. Second Chance, Inc.* C03-cv-00927-JCC at *16 (W.D. Wash. August 23, 2006).

The burden is on USAA to show that Cumming’s suffered no harm as a result of its failure to assert its defenses in its denial letter, a response to the IFCA Notice, or in its Answer. It has not done so. On the contrary, the Cumming’s have shown that they were prejudiced as detailed in *Karpenski*.

B. This is a De Novo Review of a Summary Judgment Order

This is a de novo review of a summary judgment order. The burden is on USAA to prove that there is no issue of material fact and that it is entitled to judgment as a matter of law. CR 56(c). Respondent’s Brief is filled with conclusory statements of fact and presumptions of fact which are either false or unsupported by any evidence in the record. The alleged facts are considered in the light most favorable to the Cumming’s.

USAA cannot offer argument or “facts” that were not before the trial court. The appellate court can only consider the information that was presented to the trial court for its consideration before issuing the order on summary judgment. *Grange Ins. Ass’n v. Ochoa Through Ochoa*, 39 Wn.App. 90, 93, 691 P.2d 248 (1984) (“In summary judgment

proceedings, this court may review only “the precise record—no more and no less—considered by the trial court.” *American Universal Ins. Co. v. Ranson*, 59 Wash.2d 811, 816, 370 P.2d 867 (1962).”); *Kataisto v. Low*, 73 Wn.2d 341, 342-43, 438 P.2d 623 (1968).

USAA now argues that the Cumming’s did not rebut a presumption that no police report was filed and therefore, there was no vandalism. (Respondent’s Brief, p.15) There is no such presumption. A police report was either filed, or it was not. This allegation is being made for the first time on appeal and was not before the trial court. It is also unsupported by alleged facts in the trial court as USAA did not allege that the Cumming’s failed to file a police report and that it was basing its denial of coverage based on this allegation. A police report or the alleged absence thereof, was not before the trial court and was not a basis on which summary judgment was granted. The Cumming’s had no opportunity to produce a police report or otherwise respond to this allegation on summary judgment. This argument should not be considered by the Court.

Additionally, it should be noted that the denial of the insurance claim was based on an exclusion in the policy for pollutants, it was not denied as a vandalism claim. USAA did not request a copy of a police report or otherwise inform the Cumming’s that the claim was a vandalism

claim and that the policy required that they file a police report in order to pursue coverage under the policy.

C. The Cumming's Suffered a Loss

USAA denied the Cumming's claim on the basis that there was no coverage for pollutants. USAA argued for the first time in its Motion for Summary Judgment that the Cumming's suffered no loss because the amount of contamination was below the threshold for remediation as established by the Washington State Department of Health. There is nothing in the insurance policy which states that no loss occurs unless a regulation or statute requires the insured to repair the damage or remediate contamination. The threshold question is whether the Cumming's suffered a covered "loss".

Whether decontamination is required in order for a house to be habitable under the Department of Health Regulations is not a determination that there was no loss. The purpose of WAC 246-205 is to "protect the public's health, safety, and welfare by establishing standards, procedures, and responsibilities for: (b) [R]egulating the occupancy and use of property where hazardous chemicals or chemical residues commonly associated with the manufacture of illegal drugs are or may be present." WAC 246-205-001(1)(b). There is nothing in WAC 246-205-541 or RCW 64.44.010 which sets a standard for whether a "loss" has

occurred. They simply provide a standard which requires decontamination in order to protect the public's health and welfare.

An analogy can make this distinction clear. If a vehicle suffers body damage the owner has suffered a loss. If the damage does not make the vehicle unsafe for operation the vehicle can still be used for transportation. If the damage to the vehicle is so extensive that the vehicle is unsafe for operation on the roads of the state, the Department of Motor Vehicles requires that the vehicle be repaired and inspected upon its return to service. RCW 46.32.070. In either case, the owner of the vehicle has suffered a loss. The determination of the state regarding the use of the property is not determinative with regards to the existence of a "loss".

In this specific case, the Cummings suffered a loss due to the contamination of their rental property by methamphetamine. The level of contamination goes towards the damages suffered while the existence of contamination establishes the loss.

USAA argues that "if there was no bright line, an insurer would always be required to ignore any statutory guidelines and be forced to remediate any contamination that resulted in any measured level of pollutant residue." (Respondent's Brief, p. 12). This is false. Absent a covered cause of loss, the amount of contamination is irrelevant. If there were no tenants who "acted in conscious or intentional disregard" of the

landlord's property rights, there would be no covered vandalism as found by the courts in *Graff v. Allstate Ins. Co.*, 113 Wn.App. 799, 54 P.3d 1266 (2002), *review denied*, 149 Wn.2d 1013 (2003) and *Bowers v. Farmers Ins. Exchange*, 99 Wn.App. 41, 47, 991 P.2d 734 (2000).

The Cumming's suffered a loss as they had to disclose the presence of methamphetamine at a measurable level in order to sell the property. CP

Additionally, the Cumming's suffered a loss due to the presence of a strong odor and stains on the carpet that was completely ignored by USAA in its denial of the claim. This is not methamphetamine contamination. USAA alleges that its investigation of the claim was reasonable because it hired BioClean to conduct methamphetamine testing. USAA never inspected the loss and focused entirely on the methamphetamine issue to the exclusion of the other losses suffered by the Cumming's. USAA ignored these damages in the trial court and continues to do so.

D. The Loss is Covered by the Insurance Policy

At a minimum, there is an issue of material fact whether the Cumming's suffered a covered loss. None of the defenses offered by USAA preclude coverage for the stains on the carpet and the cause of the

strong odor in the home. Likewise, USAA has not shown that the presence of methamphetamine in the rental home is not a covered loss.

USAA argues that there is a presumption that “**there was no methamphetamine contamination and therefore no methamphetamine laboratory**”. (Respondent’s Brief, p. 14) (emphasis in original). USAA offers no legal authority for this so-called presumption and it flies in the face of logic. Methamphetamine was detected in the home and therefore, it was contaminated. As discussed previously, the level of contamination simply triggers the state requirement for remediation in order to protect the public health and welfare.

USAA also argues that there were no “sudden and accidental damages” to the dwelling. This argument was disposed of in *Bowers*. As noted by the court in *Bowers*, the damages were accidental insofar as the insured was concerned. *Bowers*, at 45. The same is true with respect to the Cumming’s.

USAA also makes ridiculous arguments when it relies on two provisions in the policy which are not applicable to the Dwelling Coverage which is at issue in this case. First, USAA relies on a portion of the policy which applies only to Other Structures. USAA states that “[t]he rental insurance contract states, “*We do not cover: ...Structures used in*

whole or part for “business” unless such use consists solely of office space for paperwork, computer work or use of a telephone,” etc. (emphasis added.)” This is quoted from **COVERAGE B – Other Structures**. CP 260. The Dwelling is at issue in this case, not other structures, and it is disingenuous to quote a portion of the policy which clearly does not apply and fail to state the portion of the policy it comes from.

USAA offers an equally unsound and disingenuous argument when it quotes an exclusion in the policy from “Section II - Liability Coverages”. (Respondent’s Brief, pp. 17-18). This section of the policy has nothing to do with this case. This case does not involve a liability claim under the policy; it involves a claim for property damage under the Dwelling coverage.

Section I – Property We Cover clearly states:

COVERAGE A - DWELLING

We cover:

1. The dwelling on the “**described location**” shown in the Declarations, including structures attached to the dwelling;
... CP 262.

The “described location” means the location shown in the Declarations. “**Described location**” also includes other structures and grounds at that location. CP 259. The purported portions of the policy

relied upon by USAA have nothing to do with a property loss to the dwelling; the quoted language does not exist in the property coverage portion of the policy which is at issue in this case.

Methamphetamine was remediated from the home prior to the lease of the property by the tenant, Ross Kolditz. No other tenants occupied the premises. Immediately after the lease ended, methamphetamine contamination was found in the home. It is an admitted fact that methamphetamine contaminated the property. USAA argues that because the level of contamination is below the remediation standards of the Washington Department of Health that the property is not contaminated. This is false. Methamphetamine is not a naturally occurring substance that is present in the environment. BioClean tested the property and found the presence of methamphetamine.

The courts in *Bowers* and *Graff* did not rule that the homeowner was required to prove that a marijuana grow operation or methamphetamine laboratory existed in the home in order to prove vandalism. Instead, the standard is whether the tenant “acted in conscious or intentional disregard” of the landlord’s property rights when they damaged the property. The damage in *Bowers* was caused by mold due to the excess moisture generated by the grow operation. The same standard would have applied to an orchid growing hobby of a tenant. It is the

conscious or intentional disregard of the property rights of the landlord resulting in damage to the rental property that constitutes vandalism. USAA has offered no evidence that the tenant did not act in conscious or intentional disregard of the Cumming's property rights and therefore, failed to meet its burden of proving that there are no issues of material fact and they are entitled to judgment as a matter of law.

Although proof of a methamphetamine laboratory is not required, even by its own interpretation of the law USAA has not shown that there was no methamphetamine laboratory. On summary judgment, USAA bears the burden of proof.

It is for the jury to determine if there was an intentional or conscious disregard of the Cumming's property rights by the use or manufacture of methamphetamine by the tenants. If the jury finds that there was, then under the holdings in *Bowers* and *Graff* there is coverage for vandalism.

E. There was No Misrepresentation by the Cumming's

USAA argue that the Cumming's intentionally misrepresented that the property was not going to be used for business purposes. USAA bears the burden of proving this claim. This fallacious claim is not supported by a scintilla of evidence.

USAA continues to argue that the Cumming's misrepresented the use of the property when they applied for the insurance policy, while also acknowledging the timeline of events which makes this impossible. It is impossible for the Cumming's to have misrepresented future events unless they knew in advance who the tenant would be, and USAA has not even alleged this, let alone proved it. The fact that the Cumming's knew that the tenant was using the property for business purposes *when they filed their insurance claim*, is not proof that they knew it was going to be used for business purposes when they applied for insurance. USAA offered the trial court no evidence of when the Cumming's became aware that the tenant was using the property for business purposes. USAA also provided no evidence that the Cumming's misrepresented the use of the property to USAA in communications subsequent to the application for insurance.

USAA has offered no application for insurance showing that the Cumming's misrepresented anything. In order to rely on the application, it is necessary for it to be attached to the policy of insurance and given to the insured. RCW 48.18.080(1). The application is not admissible in evidence because it was not attached to the policy. The application apparently does not exist as USAA now states that "Cumming requested a quote over the phone and did not fill out a paper or electronic application for insurance coverage." (Respondent's Brief, p. 20). The application for

insurance was not offered to the trial court and no claim of misrepresentation in the application can be supported without it. RCW 48.18.080(1).

The sole evidence offered by USAA was the testimony of an employee who reviewed the underwriting file and was familiar with it. In Respondent's Brief, USAA misstates what their own witness stated: "Sandra Sausman reviewed the circumstances surrounding Cumming's request for a quote and noted that Cumming had stated the subject property was **not going to be used for business purposes**. (CP 236 ¶ 5.)" This is false. She actually stated that "[I]n their application, the Cummings confirmed that the Subject Property was not being used for farming, business or commercial purposes." CP 236 ¶5. Ms. Sausman refers to an application, which USAA now admits does not exist, and states that the Cumming's "confirmed that the property was not being used" rather than "stated that the property was not going to be used" for business purposes. Furthermore, she does not state that she took the application over the phone, so she is not a firsthand witness to the application. She does not have any firsthand knowledge of what was discussed during the phone conversation. She also does not state what questions were asked of the Cumming's in their application.

The testimony of Sandra Sausman cannot be offered by USAA in order to circumvent the requirements of RCW 48.18.090(1). The statute clearly states that “[N]o application for the issuance of any insurance policy 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.” The application is inadmissible if it is not attached to the policy and there are no exceptions for applications taken over the phone or electronically.

USAA appears to claim that the Cumming’s committed misrepresentation by failing to inform it that their tenant was using the property for business purposes. USAA offers no evidence that the Cumming’s made any misrepresentations to it in breaching this alleged “duty”.

First, there is no “duty” in the insurance policy requiring the Cumming’s to inform USAA that they had become aware that the tenant was using the property for business purposes. The duty expressed by USAA is imaginary. The policy clearly states the following:

20. Changes

- a. The premium is based on the information we have received from you and other sources. You agree to cooperate with us in determining if this information is correct and complete. You agree

that if this information changes, or is incorrect or incomplete, we may adjust your premiums accordingly during the policy period. CP 281.

USAA has not shown that the Cumming's failed to cooperate in determining if the information is correct and complete. There is no requirement in this section of the policy placing an affirmative duty on the Cumming's to report anything. It also states that the premium would be adjusted not that the policy would be void. USAA has failed to show that they ever asked the Cumming's if the property would be, or was being, used for business purposes. USAA has offered no application for insurance that shows the Cumming's misrepresented anything, nor any later communications in which they allegedly misrepresented the use of the property.

Second, the relationship between the Cumming's and USAA is based on a contract of insurance. Even if there were a duty to inform USAA, the policy provides that the remedy would be the cancellation of the policy. **SECTIONS I AND II – CONDITIONS, 4. Cancellation, b. (3)**, allows for the cancellation of the policy by USAA with written notice to the Cumming's "[W]hen this policy has been in effect for 60 days or more, or at any time if it is a renewal with us, we may cancel:

- (a) Upon discovery of fraud, concealment or misrepresentation made by or with the knowledge of any “**insured**” in obtaining this policy, continuing the policy, or presenting a claim under this policy; or
 - (b) If the risk has changed substantially since the policy was issued.
- ...” CP 290-291.

Third, there was no requirement in the policy that the Cumming’s inform USAA that the risk had changed. The Cumming’s are consumers and are not expected to know the internal underwriting policies of USAA. Unless USAA showed that the Cumming’s committed fraud, concealment or misrepresentation the remedy in the policy for a substantial change in risk would be cancellation upon written notice to them. This did not happen and would not deny them coverage for their covered loss while the policy was in force.

USAA has not, and cannot, show misrepresentation on the part of the Cumming’s. The Cumming’s had no affirmative duty to inform USAA of the business use of the property by their tenant. Absent, fraud, concealment or misrepresentation, a breach of that duty would only allow USAA to cancel the policy. It would not void coverage under the policy.

F. The Investigation by USAA was Not Reasonable

An “insurer must make a good faith investigation of the facts before denying coverage and may not deny coverage based on a supposed defense which a reasonable investigation would have proved to be without merit.” *Indus. Indem. Co. of the NW., Inc. v. Kallevig*, 114 Wn.2d 907, 917, 792 P.2d 520 (1990).

USAA was willfully blind to the facts related to the loss. Despite knowledge that there was a strong smell in the house and stains on the carpet, USAA sent no adjuster to inspect the property and relied solely on a test for methamphetamine to determine coverage. As noted in *Specialty Surplus* “the cases in which an insured is found to have failed to “investigate” usually involve total incuriosity on the insurer’s part, a willful blindness to the facts, or an unexplained failure to eliminate known plausible alternative explanations for the events giving rise to the claim.” *Specialty Surplus*, at *20.

The only investigation by USAA was methamphetamine testing by BioClean, there was no testing for any other possible contamination and no inspection of the premises despite claims of a strong odor and stains on the carpet. This was either a willful blindness to the facts or an unexplained failure to eliminate plausible alternative explanations for the smell or stains. There was no reasonable investigation of the claim. It is

bad faith by an insurer to fail to reasonably investigate a claim. *Kallevig*, at 917.

II. ORDER OF DEFAULT

In order to set aside the order of default, USAA was required to show both excusable neglect and due diligence. USAA focuses on due diligence which has not been contested by the Cumming's, and fails to address controlling authority on the issue of excusable neglect.

USAA is an insurance company and is expected to respond to legal process served upon it. *Prest v. Bankers Life Assur. Co.*, 79 Wn.App. 93, 99-100, 900 P.2d 595 (1995), *review denied*, 129 Wn.2d 1007 (1996). Attorneys cannot be held to a lower standard than their clients when it comes to understanding the relevant statutes and service of process.

The insurance company is expected to respond to process, therefore, its attorneys are expected to do the same. Despite representations to the contrary, this was not a simple calendaring error, it was a lack of understanding of the relevant statute by counsel. CP 45-72. USAA failed to appear or defend prior to the expiration of the time to do so, even though it was given 40 days rather than the usual 20 days. RCW 48.05.200(5). In clear and unambiguous language, RCW 48.05.200(1) provides that the Office of the Insurance Commissioner is the registered

agent for USAA in the State of Washington. Lack of knowledge of these statutes is not excusable neglect for USAA or its counsel.

It is an abuse of discretion for the trial court to exercise its discretion on untenable grounds or for untenable reasons. Failure of an insurance company, or its counsel, to respond to process is neglect; however, it is not excusable. *Prest*, at 99-100. It is an abuse of discretion to set aside the default order against USAA as it failed to show excusable neglect.

III. 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 20th Day of November, 2019

LAW OFFICES OF NEAL BONRUD PLLC

A handwritten signature in black ink, appearing to read 'NEAL BONRUD JR.', written over a horizontal line.

By

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CERTIFICATE OF SERVICE

I certify that I caused one copy of the foregoing Reply 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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