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MAR 20 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Case No. 327451

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

The Estate of Susan Hunter

Appellant,

v.

Allstate Insurance Company,

Respondent/Cross-Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATUTES AND RULES	v
I. ASSIGNMENTS OF ERROR	1
II. ISSUES REGARDING ASSIGNMENT OF ERROR	1
III. STATEMENT OF THE CASE	2
A. OVERVIEW OF BACKGROUND FACTS	9
IV. ARGUMENT	30
A. THE STANDARD OF REVIEW	30
B. THE ANALYTICAL FRAMEWORK	31
1. DENIAL OF CONSOLIDATION WAS BASED ON FACTS UNSUPPORTED IN THE RECORD AND THE COURT APPLIED THE WRONG LEGAL STANDARD	31
2. IMPROPER CLAIM SPLITTING DID NOT OCCUR AND RES JUDICATA NEVER APPLIED	42
V. CONCLUSION	48
ATTORNEY’S FEES AND COSTS	50
APPENDICES:	
A. SUSAN HUNTER PROBLEM DESCRIPTION	(CP-1241)
B. ALLSTATE INVESTIGATION REPORTS	(CP-1242; CP-2865)
C. JUNE 4 TH , 2004 KEY NOTICE TO ALLSTATE	(CP-2788)

D. JUNE 5TH, 2005 AMENDED POLICY PAPERS (CP-2055-2059)

E. ALLSTATE'S MISREPRESENTATION TO THE COURT
(CP-2306)

TABLE OF AUTHORITIES

<u>Allstate v. Huston</u> , 123 Wash. App. 530 (2004)	28
<u>Armstrong v. Safeco Insurance Co.</u> , 111 Wn.2d 784 (1988)	23
<u>Bates v. Bowles</u> , 56 Wn.2d 374, 378-9 (1960)	9
<u>Blomquist v. Grays Harbor Medical Service Corporation</u> , 48 W.2d 718, 296 P.2d 319 (1956)	38
<u>Bohlinger v. Ward & Co.</u> , 34 N.J. Super. 583, 113 A.2d 38 (1955)	11
<u>Clark v. Baines</u> , 150 Wn.2d 905, 913, 84 P.3d 245 (2004)	48
<u>Cornhusker Casualty Ins. Co. v. Kachman</u> , 165 Wn.2d 404, 411, 198 P.3d 505 (2008)	36
<u>Ensley v. Pitcher</u> , 152 Wash. App. 891, 222 P.3d 99 (2009)	43
<u>Federated American Insurance Co. v. Marquardt</u> , 108 Wn.2d 651 (1987)	9
<u>Hanger Prosthetics & Orthotics East, Inc. v. Henson</u> , 299 Fed.Appx. 547, at 555-56 (6 th Cir. 2008)	35
<u>Hawley v. Mellem</u> , 66 Wn.2d 765, 405 P.2d 243 (1965)	30
<u>Hisle v. Tood Pac. Shipyards Corp.</u> , 151 Wn.2d 853, 93 P.3d 108 (2004)	48

<u>Industrial Indem. Co. of the N.W., Inc. v. Kallevig</u> , 114 Wn.2d 907, 792 P.2d 520 (1990)	37
<u>Kreidler v. Statewide General Ins. Co.</u> , 182 Wash. 557 (2014)	11
<u>Landry v. Luscher</u> , 95 Wash. App. 779, 976 P.2d 1274 (1999)	31, 43
<u>Liebergesell v. Evans</u> , 93 Wn.2d 881 (1980)	9
<u>Lien v. Couch</u> , 993 S.W.2d 53 (Tenn. Ct. App. 1998)	32
<u>Luisi Tuck Lines, Inc. v. Utilities & Transportation Commission</u> , 72 Wn.2d 887, 435 P.2d 654 (1967)	48
<u>Magana v. Hyundai</u> , 167 Wn.2d 570, 220 P.2d 191 (2009)	28
<u>Marshall v. Champman's Estate</u> , 31 Wn.2d 137 (1948)	47
<u>Mayor v. Sto Industries, Inc.</u> , 156 W.2d 677, 132 P.2d 115 (2006)	28
<u>Mellor v. Chamberlin</u> , 100 Wn.2d 643 (1983)	46, 48
<u>Metropolitan Park Dist. V. Griffith</u> , 106 Wn.2d 425 (1986)	9
<u>Meyer v. Sto Industries, Inc.</u> , 156 Wn.2d 677, 132 P.3d 115 (2006)	24
<u>Mountain Park Homeowners Association v. Tydings</u> , 125 Wn.2d 337, 883 P.2d 1383 (1994)	31
<u>Notredan, LLC v. Old Republic Exchange Facilitator Co.</u> , 875 F. Supp. 2d 780 (W.D. Tenn. 2012)	32
<u>Olivine Corp. v. United Capitol Ins. Co.</u> , 147 Wn.2d 148, 52 P.3d 494 (2002)	36
<u>Orsi v. Aetna Insurance</u> , 41 Wash. App 233 (1985)	9
<u>Physicians Ins. Exchange v. Fisons Corp.</u> , 122 Wn.2d 299, 858 P.2d 1054 (1993)	24, 28

<u>Salas v. Hi-Tech Erectors</u> , 168 Wn.2d 664, 230 P.3d 583 (2010)	30
<u>Smith v. Behr Process Corp.</u> , 113 Wash. App. 306, 54 P.3d 665 (2002)	28
<u>Smith v. Safeco Ins. Co.</u> , 150 Wn.2d 478 (2003)	37
<u>Sprague v. Adams</u> , 139 Wash. 510, 247 Pac. 960 (1926)	43
<u>St. Paul Fire & Marine Insurance Co. v. Onvia, Inc.</u> , 165 Wn.2d 122 (2008)	23
<u>State v. Quismundo</u> , 164 Wn.2d 499, 192 P.3d 342 (2008)	31
<u>State v. Rohrich</u> , 149 Wn.2d 647, 71 P.3d 638 (2003)	31
<u>Van Noy v. State Farm Mutual Auto Ins.</u> , 98 Wn. App. 487 (1999)	37
<u>Williams v. Leone & Keeble, Inc.</u> , 171 Wn.2d 726, 254 P.3d 818 (2011)	48

STATUTES AND RULES

RCW 4.84.185	27
The Consumer Protection Act (CPA) (RCW 19.86)	34, 37
RCW 19.86.120	35, 39
RCW 48.01.030	27, 37
RCW 48.17.480	9, 10
RCW 48.18.230	28

RCW 48.18.290	2,10,11,15, 20, 21,36,38,40,46
RCW 48.18.290(1)	2
RCW 48.18.2901	2, 11
The Insurance Fair Conduct Act (IFCA) (RCW 48.30.015)	33, 34, 37, 40, 46, 49
RCW 48.30.015(2)	17, 40, 46
RCW 48.30.015(5)(a)	20, 26, 37
RCW 48.30.015(5)(b)	26, 37
RCW 48.30.190	9, 10, 26, 27
RCW 48.53.040(1)(b)	36, 38
WAC 284-30	17
WAC 284-30-320(6)	19
WAC 284-30-330(1)	26, 26, 35, 36, 40, 45, 48
WAC 284-30-330(4)	20
WAC 284-30-330(6)	20, 21, 26, 35, 36, 39, 46
WAC 284-30-340	19
WAC 284-30-350	26, 36, 40, 45, 48
WAC 284-30-570	6, 36, 38

WAC 284-30-580(1)	26
CR 11	5, 27, 34
CR 26(g)	24, 27
CR 26(i)	19
CR 42	42
CR 42(a)	1, 49
CR 54(b)	48
RAP 14.4	50
RAP 18.1	50
RPC 3.1	27
RPC 3.3	27
RPC 3.4	27
RPC 4.1	27
Claim Splitting	42
Claim Preclusion	33, 48
Collateral Estoppel	31, 33, 34, 48
Compulsory Counterclaim	33
Consolidation	31
Res Judicata	31, 33, 34, 43, 48

Restatement Second, Judgments Section 24 (1982)	32, 47
Restatement Second, Judgments Section 26(1)(c) Comment c (1982)	33

I. ASSIGNMENTS OF ERROR:

A. The trial court erred by refusing to grant Plaintiff's CR 42(a) Motion to consolidate the Plaintiff's new claims arising from a new and distinct incident perpetrated by the defendant as set forth in case #12-2-00314-5, into the original existing case for the earlier violations and claims against the same defendant as previously set forth in Case #07-2-00020-4.

B. The trial court also erred by dismissing all the Plaintiff's new claims without giving the Plaintiff any opportunity to reach the merits based on the erroneous conclusion that the Plaintiff engaged in improper claim splitting.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

A. Did the trial court's decision to deny the Plaintiff's motion to consolidate rest on facts unsupported in the record or was it reached by applying the wrong legal standard?

B. Did Defendant Allstate really ever prove all the elements required to establish that the Plaintiff had ever really engaged in any illegal claim splitting that would justify dismissal?

III. STATEMENT OF THE CASE

(OVERVIEW OF BACKGROUND FACTS)

Ms. Susan Hunter, a widowed grandmother, summarized this case in a single page at CP-1241 (Appendix A) and Allstate summarized this case in a single page at CP-1242 (Appendix B, page 1 of 2). On May 11, 2004, Allstate issued a landlord insurance policy in favor of Plaintiff Susan Hunter, for a two-story brick rental home at 251 Briskey Lane, in Naches, Washington in Yakima County “with no fixed date of expiration” – CP-1157 – (which triggers RCW 48.18.290(1)’s 45 day advanced written notice of cancellation requirements applicable to any policy which “does not contain a clearly stated expiration date”, and also triggers RCW 48.18.2901’s automatic annual renewal or mandatory advanced written notice of non-renewal requirements which apply to any policy covered by RCW 48.18.290). A June 5th, 2004 Amended policy was also issued with the exact same “no fixed date of expiration” language at CP-2057 (see also Appendix D). As required by the above cited statutes already, page 5 of the policy expressly promised that Allstate would send advanced written notice of cancellation for any intended cancellation, and advanced written notice of non-renewal before any non-renewal. CP-1165.

On May 28, 2004, Allstate incorrectly inspected 253 Briskey Lane, Ms. Susan Hunter's own personal residence, a mobile home, already fully insured by Allstate for the last 7 years since December 14th, 1998. CP-1155, para 5-6; CP-1195. On May 29, 2004, Ms. Hunter paid the full annual premium charge for the correct property at 251 Brickey Lane, in care of Allstate agent Gregory Schlagel's office assistant, Oneida Montemayor, which was received by Ms. Montemayor whose job it was receive Allstate client checks (as admitted at CP-1050, line 33 to CP-1051, line 4 and CP-1098, line 7 to CP-1099, line 21), as instructed by agent Schlagel. Allstate admitted "Defendant Schlagel is Allstate's agent" and used this assertion to obtain an order continuing a hearing date. CP-1131, line 11.

On Wednesday, June 2nd, 2004, at 12:36 pm, Allstate sent an email to agent Schlagel informing him that the mobile home that was inspected on May 28th, 2004 was unacceptable for the new landlord's policy that had been issued for 251 Briskey Lane on May 11th, 2004, such that Allstate "will start the cancellation process 7 days after the above date of this [June 2nd, 2004] email." CP-2788. Two days later, on Friday, June 4th, 2004, at 3:24 pm, Mr. Schlagel replied to Allstate's initial concern prior to any

commencement of any cancellation process by immediately advising “the house we wrote is a solid block house, not a mobile home they must of inspected the wrong place.” CP-2788 (Appendix C).

On that same Friday, June 4th, 2004, Allstate actually received agent Schlagel’s June 4th, 2004 email informing Allstate that the home at issue was not a mobile home but instead was of block construction. Id. This fact was not disclosed by Allstate until 8 years later on 3/12/12 at CP-2342 to CP-2345. On June 5th, 2004, Allstate having received agent Schlagel’s June 4th email the day before, actually relied on agent Schlagel’s email and internally Amended the policy to acknowledge Allstate’s corrected knowledge and belief that the home was not a mobile home, and corrected to the structure type listed in the amended policy to reflect that “the dwelling is of Brick construction”, and also reduced the premium by \$15.00, as was also later albeit accidentally disclosed by Allstate for the first time ever on 01/05/12 at CP-2055 to 2059. The belated disclosure of the amended policy confirmed and forced Allstate to admit receiving the June 4th email.

On June 14th, 2004, rather than ever sending Ms. Hunter the

amended policy of June 5th, 2004, or the \$15.00 reduced premium refund owed to Ms. Hunter for correcting the structure type, Allstate instead sent a June 12th, 2004 notice (CP-1204) that the policy on the 2-story brick home would be cancelled on August 7th, 2004 solely due to “mobile home” status, (which Allstate knew as of 10 days earlier from the Email of June 4th, 2004 was NOT a true or actual underwriting concern or a justifiable reason for cancellation), unless Ms. Hunter could “correct the problem” by contacting her assigned Allstate agent. The June 12th, 2004 notice mailed out on June 14th, 2004 (CP-1233 to CP-1234) told Ms. Hunter: “Your mobile home does not qualify for an Allstate landlord Package policy. . . . Please contact your Allstate agent if you correct the reason(s) listed above. He or she may be able to reinstate your policy or offer you a new policy.” CP-1204.

Starting on February 12th, 2009, Allstate made CR 11 certified statements to the Court in its pleadings which claimed “Allstate mailed notice of cancellation dated June 12, 2004, to Plaintiff. The notice provided the true and actual reason for cancellation [mobile home status].” CP-1557, lines 24-5. “The notice provided the true and actual reason for cancellation at that time.” CP-1559, line 25 (emphasis added). “The

language was clear and simple, and did not require the insured to conduct additional research to understand the [real] reason for cancellation [allegedly in compliance with WAC 284-30-570's express requirement that the insurance company "shall give the true and actual reason for its action in clear and simple language, so that the insured or applicant will not need to resort to additional research to understand the real reason for the action"].” CP-1559, line 26 to CP-1560, line 1.

Allstate further alleged: “Allstate’s cancellation notice, received by Ms. Hunter, cited the true and actual reason why it was cancelling Plaintiff’s insurance policy. The true and actual reason was that Allstate does not write landlord insurance policies for mobile homes [and thus, the June 12 notice was mailed out on June 14th and explicitly provided Ms. Hunter with Allstate’s true and actual reason for its action as set forth in the notice which was “your mobile home does not qualify for an Allstate Landlord Package policy”]. There was nothing false or misleading about the [notice of intent for mobile home] cancellation.” CP-1560, lines 9-12, and again at CP-1563, lines 6-9. “Allstate mailed notice to Ms. Hunter stating the actual reason the policy was to be cancelled [that the 2-story brick home was a

mobile home].” CP-1561, lines 25-26. “Allstate issued a timely notice of cancellation stating the actual reason for cancellation of the policy.” CP-1585, lines 2-3. “On Allstate’s good faith belief that it had inspected the correct property [a mobile home], Allstate timely and properly notified Plaintiff it could not write the policy.” CP-1586, lines 1-2. Allstate even convinced co-defendant Schlagel to believe that Allstate had never received his June 4th email and as such even Agent Schlagel claimed that the June 12th, 2004 notice of intent to cancel the insurance policy due to mobile home status which was mailed out on June 14th, 2004, truly and actually “was based on what Allstate believed at the time was a structure of a type it does not insure [mobile homes].” CP-1589, lines 1-2.

On June 16th, 2004, Allstate also mailed out a letter (CP-2495) with a refund for \$270.00 to Susan Hunter (without disclosing that \$15.00 of that refund was actually for the reduced premium that had resulted from Allstate relying on Allstate insurance agent Schlagel’s 6/4/04 notice to Allstate that the home was not a mobile home but was a brick home and that Allstate amended to the policy after correcting its knowledge regarding the true and actual structure type). CP-1147, lines 6-8. On Saturday June 19th, 2004,

Susan Hunter returned from working the night shift all week out of town to spend father's day weekend in Naches with her son and grandkids before she had to wake up on Monday afternoon and head back out of town for another week at her night job. CP-1036, lines 7-11; CP-1040, lines 14-19; CP-1043, lines 4-11. On June 22nd, 2004, Ms. Hunter phoned agent Schlagel about the 6/12/04 notice she found waiting at home suggesting she should correct the mobile home defect on the 2-story brick home to keep or secure coverage, and reminded him the rental home was not a mobile home.

Agent Schlagel told Ms. Hunter he would have the correct property inspected, but his computer was showing a refund was already on its way so Ms. Hunter should re-send him a premium payment again for exactly \$255.00 and she would be fine, and he would make sure everything was taken care of. CP-1043, lines 4-29, confirming Allstate's agent "Schlagel told Susan not to worry about anything, everything would be taken care of and there wouldn't be any further paperwork unless there was a problem [with the inspection of the correct home] in which case she would get a new

cancellation notice and another refund again¹. Susan was visibly relieved.” Id. Schlagel admitted receiving this phone call from Ms. Hunter at CP-1062, lines 5-9, and also admitted that he most likely told Ms. Hunter “we can get the policy re- the policy - we can get the house reinstated since they inspected the wrong mobile home, to please send a check for \$255.” CP-1078, lines 20-25.

Schlagel also admitted he tells his Allstate customers to just pay when they receive a bill. CP-1058, lines 8-10. Schlagel also admitted that if Allstate had no concerns after inspecting the correct property, there would

¹ There is a mandatory statutory and fiduciary duty to bind coverage with the payment or to notify of any problems that prevent doing so and to send the payment back if coverage not bound. RCW 48.30.190 and RCW 48.17.480; Bates v. Bowles, 56 Wn.2d 374, 378-9 (1960)(“a broker or agent is liable for failure to perform a contract to procure insurance and for failure to notify the owner of the property that he cannot obtain the insurance.”) One who agrees to procure insurance for another becomes the agent for that person. Orsi v. Aetna Insurance, 41 Wash. App 233, 239 (1985). The duty of an agent to a principal to bind the coverage is not just any duty, it is a fiduciary duty. Liebergesell v. Evans, 93 Wn.2d 881, at 890-91 (1980). All contracts are deemed to be made in contemplation of existing law. Federated American Insurance Co. v. Marquardt, 108 Wn.2d 651 (1987). Each party to a contract has the additional contractual duty of good faith and to fully cooperate and to communicate with the other so that each may obtain the full benefit of his or her bargain. Metropolitan Park Dist. v. Griffith, 106 Wn.2d 425, 537 (1986).

be no notices sent to Ms. Hunter, and if there were concerns then Allstate would send a notice advising Ms. Hunter of those concerns. CP-1085, lines 12-15 and CP-1086, line 22 to CP-1087, line 4. On June 23rd, 2004, a new inspection was requested, to inspect the correct home, as reflected on the "Inspection Request" sheet. CP-1188. On June 29th, 2004, Allstate finally inspected the correct home and determined the value for the structural policy limits should be \$156,238.00, not \$128,138.00. CP-1155, para 9; CP-1196. Allstate witness David Hart's 12/30/08 declaration at CP-1155, finally provided the long sought after inspection date (6/29/04) for the correct home and its roof, as well as the previously unknown identity of the inspector, and revealed that even if Allstate had ever tried to issue any 45-day advanced written cancellation notice for any roof issue on the correct home under RCW 48.18.290, the inspection of the correct home was only 39 days before the 8/7/04 date that Allstate had gone ahead and silently marked the policy as cancelled in its own computers.

On July 2nd, 2004, Allstate's agent Schlagel received Ms. Hunter's premium payment check dated June 29th, 2004 for \$255.00 triggering the RCW 48.30.190 and RCW 48.17.480 fiduciary duty to immediately bind

coverage or to send the payment back.² CP-1371, lines 8-11; CP-1141, lines 11-15; CP-1206. On August 7th, 2004, without ever telling Ms. Hunter about any true or actual underwriting concerns that would ever actually justify cancellation of the amended policy for the correct home, Allstate silently cancelled the amended policy. Allstate claimed that: “In this case [at some point after the June 29th, 2004 inspection of the correct home], Allstate made the decision not to write the landlord policy for the home because the ROOF needed repairs.” CP-1373, lines 15-16 (emphasis added). No RCW 48.18.290 notice was ever sent about any roof concern.

On the first anniversary date of May 11, 2005, given the absence of any notice of intent to cancel due to a bad roof as needed for a valid cancellation of such an insurance policy with no fixed expiration date, the policy automatically renewed for one more year pursuant to RCW 48.18.2901 since Allstate also never sent any 45 day advanced written notice of any non-renewal either. CP-3114, para 3 and CP-3117, last

² Premium payments made to an authorized agent of the insurance company are deemed in the law to have been made to the insurance company whether the agent remits the payment to the insurance company or not. Kreidler v. Statewide General Ins. Co., 182 Wash. 557, 569 (2014)(citing Bohlinger v. Ward & Co., 34 N.J. Super. 583, 591, 113 A.2d 38 (1955)).

paragraph through CP-3118, first para. On March 6th, 2006, during the automatic renewal period of the policy coverage, a late night electrical fire completely destroyed the home. CP-1027, para 4. On March 7th, 2006, the next morning, a fire loss claim on the policy was reported to Allstate through agent Schlagel. CP-1027, line 30 to CP-1033, line 6; CP-1140, lines 1-2. During that phone call, agent Schlagel again confirmed the “mobile home” notice of intent to cancel was an error that had been taken care of already when Susan called and resent payment – “we took care of that August [cancellation] notice already.” CP-1028, para 9. However, Schlagel said his computer was showing that Allstate had gone ahead on August 7th, 2004 and marked the policy as cancelled because of a roofing concern that allegedly arose upon inspection of the correct home that he could not elaborate on or produce any supporting documentation or notices for. CP-1028, lines 23 to CP-1029, line 8; CP-1029, line 25 to CP-1030, line 26; and CP-1031, lines 1-18.

On March 10th, 2006, Ms. Hunter sent a demand letter through her attorney to Agent Schlagel and Allstate demanding a copy of any bad roof inspection report and a chance to talk with the alleged bad roof inspector

and for production of phone records showing any long distance phone call that was ever allegedly made by Mr. Schlagel to Ms. Hunter regarding the same. CP-1235 and 1236. On March 13th, 2006, Allstate noted that it “was able to print copy of the initial rejection ltr [for mobile home status, however. . .]. There is no record of a second ltr being sent to insd . . . that second ltr would be initiated by agent. . . we are unable to confirm coverage at this time “. CP-1237. In fact, on March 21st, 2006, Allstate noted “Agree CAT 2 potential error to be investigated. Need to see if any cancelation/termination letter was sent to customer and to what address. Client file does not show under documents history. . .” CP-1238. On 3/24/06, Plaintiff’s Counsel wrote to Allstate: “I have not heard back on my requests for certified copies of the relevant insurance policies.” CP-2099.

On March 29th, 2006, Plaintiff’s counsel again wrote to Allstate and said “we really need to get moving on this claim . . . it has already been three weeks. Unless Allstate promptly agrees to cover the claim, I will otherwise have to commence litigation against Allstate agent, Greg Schlagel. . . Please see that I receive the certified copies of the relevant insurance policies that I had requested previously [the applicable policy for

Susan's rental home and also Agent Schlagel's errors and omissions policy]" CP-2101. On April 7th, 2006, Allstate mailed a certified copy of the requested applicable policy documents to Allstate's Paul Dilley to forward to Plaintiff and Plaintiff's counsel. CP-2103 to 2104.

On April 14th, 2006, Allstate's records show that Paul Dilley mailed what was represented to be a certified copy of the policy to Susan Hunter. CP-2104. However, all the key documents and correspondence that would reveal that Allstate knew the home being insured was truly and actually a brick home not a mobile home, and that Allstate had issued an amended policy correcting the structure type to brick in full reliance thereon, were all redacted from the certified copy of the policy what was provided by Allstate to the Plaintiff CP-2108 to CP-2151 and from what Allstate filed with the Court at CP-1157 to CP-1187. The redacted documents were not revealed till January 5th, 2012, just one month before the 5-day, 12-person jury trial date set for February 7th, 2012 (at CP-1982-1983), when Allstate curiously refiled the policy with several pre-trial pleadings and Plaintiff just happened to notice 3 extra pages at CP-2055, 2057, and 2059 (Appendix D).

However, back on September 27, 2006, one Allstate employee actually asked another “Was there a claim on this policy?” CP-2866. On September 28, 2006, Allstate responded to Ms. Hunter’s complaint to the Insurance Commissioner (at CP-1239-1241) about not knowing what was going on with her claim or who was even handling it, by a reply at CP-1407-1408, merely stating that Allstate had concerns about a bad roof that they thought agent Schlagel had telephoned Ms. Hunter about at some unstated point in time, but certainly not claiming any compliance with the mandatory 45 days advanced WRITTEN notice of any such roofing concern for cancellation at RCW 48.18.290. On April 29th, 2008, as soon as Mr. Schlagel was deposed under oath, he recanted the phone call story and also admitted that all the phone records showed that no such call was ever made to Ms. Hunter from anyone at his office and that he personally also had no actual memory of ever actually making such a call either. CP-1397, lines 7-25 and CP- 1398, line 11 to CP-1401, line 6.

On September 28th, 2006, although it was never passed along to the Insurance Commissioner or to Ms. Hunter, Allstate’s John Miller emailed to Allstate’s Char Peterson some concerns that he felt that Allstate needed

to admit to the Insurance Commissioner: . . . “I feel we should have reinstated her coverage and after property services found discrepancies with the paint and roof, she should have been sent a corrected copy notifying her of the problems . . . Greg [Schlagel] and his staff have researched and cannot find any evidence that she was sent notice of the reason for cancellation other than the first notice [the mobile home notice]. I honestly see this as a problem that I feel should be address as if this would have been the case; I feel this incident may not have happened. Just a thought for you to maybe pass on.” CP-1242 (Appendix B, page 1 Emphasis added) and See also CP-2865 (Appendix B, page 2). This information was NOT passed on by Allstate to the Insurance Commissioner or anyone else by Allstate until mandatory discovery disclosures including the same were produced on September 24th, 2008, and only after Ms. Hunter passed away.

On January 5th, 2007, Plaintiff sued agent Schlagel based on the information she had, for Schlagel apparently failing to resolve Allstate’s insurance concerns and/or failing to notify Ms. Hunter of any problems - all while just keeping the insurance premium check in his file. CP-1004-1011. However, Plaintiff was still completely unaware of Allstate’s true

knowledge or what had really happened other than Schlagel had left her premium check to bind coverage just sitting in his file without communicating any problems at all till after the fire loss.

On December 6th, 2007 The Insurance Fair Conduct Act became law governing the conduct of all insurers and making any violation of the listed provisions of WAC 284-30 subject to TREBLE DAMAGES at RCW 48.30.015(2). On January 31st, 2008 Susan Hunter died. CP-1026, lines 29-32. On March 27th, 2008, and again on March 28th, 2008, and again on April 28th, 2008, Plaintiff repeatedly asked Allstate for the name and contact information of the inspector who actually examined the roof of the correct home at 251 Briskey Lane, the actual date of the inspection, and a copy of the inspection report and any correspondence generated thereon (which would include any cancellation notice that resulted from the same), but Allstate would not respond to the Plaintiff at all. CP-1254-1258.

In Mr. Schlagel's 4/29/08 deposition, he testified under oath that Allstate's Shannon Doyle (who sent him the June 2nd, 2004 email that he had replied to on June 4th, 2004) had admitted that Allstate "should have

reinstated the policy upon [discovery of] the initial incorrect inspection. And at that point, if it failed inspection [at the correct home], they would have sent out another letter [like the June 12th mobile home letter] to Mrs. Hunter stating that because of the condition of the house [the policy would be cancelled in 45 days because of any roofing concern].” CP-1393, lines 13-25; and CP-1395, line 16 to CP-1396, line 9. Schlagel filed pleadings to the court asserting the same at CP-1588, line 10 to CP-1589, line 10.

On June 6th, 2008, after significant discovery and research, Plaintiff sued Allstate for not providing any valid notice of a true and actual underwriting concerns justifying cancellation and not sending any non-renewal notice such that Allstate’s actions and or inactions were in breach of the contract, in violation of the Consumer Protection Act, and constituted Bad Faith. CP-1004-1011. On August 18th, 2008, Allstate answered the lawsuit at CP-1133-1138. Allstate denied nineteen of the allegations in the complaint due to lack of knowledge, including but not limited to paragraphs 3.6 and 3.8 of the Plaintiff’s complaint which alleged Allstate had failed to properly notify Ms. Hunter of any rejection, cancellation or lapse of her policy, even after Ms. Hunter had addressed the 6/12/04 cancellation notice

with agent Schlagel and sent her payment and the correct property was finally inspected. CP-1134, line 20 to CP-1135, line 4.

On October 3rd, 2008, Allstate's legal counsel acknowledged in a 1.35 hour long CR 26(i) discovery conference that Allstate had in fact marked the policy as terminated back on 8/7/04 solely because of a bad roof concern but Allstate was still investigating³ and was trying to figure out the date that the roof on the correct home was actually inspected and Allstate was still trying to see if any 45-day, advanced, written notice of cancellation for a bad roof was ever sent to Ms. Hunter to validate that cancellation or not. CP-1595, lines 13-end; CP-1884, line 9 to CP-1888, line 13.

On November 4th, 2008, Allstate filed final discovery answers which stated "Allstate has yet to obtain a full understanding of all of the events and circumstances surrounding Plaintiff's claim . . . not all facts have been developed or discovered." in spite of the fact that WAC 284-30-340 required Allstate to maintain all its files on the policy and the claim "in such

³ Under WAC 284-30-320(6) "Investigation means all activities of an insurer directly or indirectly related to the determination of liabilities under coverages afforded by an insurance policy or insurance contract."

detail that pertinent events and the dates of such events can be reconstructed” because Allstate was still trying to comply with WAC 284-30-330(4) by completing a reasonable investigation prior to making any claims decision. CP-1483 and CP-1484 lines 9-20 and 23-25.

On December 30th, 2008 at CP-1155, para 9, Allstate finally acquired the knowledge of the pertinent facts and dates it needed to determine the validity of the bad roof cancellation under RCW 48.18.290. Therein, Allstate’s David Hart learned that Allstate’s inspection of the correct home had only taken place on June 29th, 2004, just 39 days before Allstate had marked the policy as cancelled for a bad roof in its own internal computers. Id. However Allstate baselessly refused concede the now mathematically certain fact that RCW 48.18.290’s 45 day advanced written notice of a true and actual reason for cancellation prerequisites had not been met for the bad roof. The clear non-compliance with RCW 48.18.290 triggered WAC 284-30-330(6)(the duty to make good faith efforts to settle the claim when liability becomes reasonable clear). Based on this 12/30/08 violation of WAC 284-30-330(6), Plaintiff amended the complaint to add this first per se IFCA violation (RCW 48.30.015(5)(a)) in Case #07-2—

00020-4, and filed it on October 16th, 2009 at CP-1567-1577.

This appeal deals with the fact that six (6) weeks after the first IFCA violation of WAC 284-30-330(6) on 12/30/08, Allstate then took things a step further. On Feb. 12th, 2009, Allstate finally issued an actual decision on the claim by ditching the bad roof cancellation theory they had been investigating but never made any decision on, and affirmatively denied the claim by asking the court to declare that the policy on the 2-story brick home was properly cancelled under RCW 48.18.290 based on a sincerely believed “mobile home” status which was allegedly a true and actual reason that was sincerely believed on the date the 45 day notice of intent to cancel for mobile home status was sent to Hunter on 6/14/04. CP-1147, lines 1-10.

On March 12th, 2009 Plaintiff argued estoppel and abandonment or waiver of Allstate’s June 12th, 2004 mobile home notice because Mr. Schlagel had said that was taken care of already and had received the check. CP-1429, line 24 to CP-1430, line 11. In the March 24th, 2009 summary judgment hearing, Mr. Leid told Judge Knodell: “And there is no factual dispute that the reason Allstate canceled the policy at the time was because

they didn't write the risk, mobile home. No question that's the true reason they cancelled the policy at that time." . . . "you want to put the customer on notice why you're canceling. There's no dispute that Allstate did that, that they absolutely canceled the policy, because it was, in their mind, an uninsurable risk." CP-2303, lines 4-8 and lines 21-25 (emphasis added). "There is no dispute about that that – that Miss Hunter's policy was canceled because of the mobile home issue. That's not a made up fact. Allstate did not cancel her policy for any reason other than they thought it was a mobile home." CP-2306, lines 12-16 (Appendix E). ". . . when you send that letter stating why you're canceling her policy, you have to give the true and accurate reason in that cancellation letter at that time." CP-2306, lines 21-24. Judge Knodell replied to Mr. Leid that "It appears that the true and actual reason why Allstate canceled her was because they thought that the property was a mobile home." and Mr. Leid responded "Absolutely." CP-2306, line 25 to CP-2307, line 3. On April 14th, 2009, the Insurance Commissioner warned Allstate that Allstate had never legally cancelled the policy and needed to provide coverage for the claim. CP-2932-2933. Nevertheless, on April 23rd, 2010, Allstate got Judge Knodell to rule at CP-

1718, lines 12-13 and CP-1720-1722, that the May 11th, 2004 policy⁴ had been properly cancelled as a matter of law because Allstate sincerely believed that mobile home status was a true and actual concern at the time it sent the June 12th, 2004 notice of cancellation on June 14th, 2004. Allstate then argued that their sincerely believed mobile home cancellation claim was a complete defense, and that without an insurance policy, an insured simply has no claim for bad faith. (CP-1991, lines 12-17; CP-1992, lines 13-15; and CP-1993, lines 1-2 and lines and 17-19).⁵ At CP-1724-1733, Allstate

⁴ Judge Knodell, like everyone but Allstate, was not aware of the superceding, June 5th, 2004 amended policy which corrected the structure type and was now governing this case because Allstate didn't disclose that until by accident on January 5th, 2012 at CP-2012-2064. Judge Knodell then found the 5/11/04 policy was cancelled for subjectively believed mobile home status even though not objectively true or actual, by using the dramatically lower, "no duty to deal for a new contract" threshold reserved for mere non-renewals of fixed termination date policies under RCW 48.18.292 and the case of Armstrong v. Safeco Insurance Co., 111 Wn.2d 784, 791 (1988). CP-1721-1722. Judge Knodell nevertheless acknowledged "The legal effect of any steps [Ms. Hunter] took to reinstate her insurance remains to be seen." CP-1722. Estoppel would apply under RCW 48.30.190 and RCW 48.17.480 based on the June 22nd, 2004 phone promises from agent Schlagel and her June 29th, 2004 premium payment received 7/2/04.

⁵ But see St. Paul Fire & Marine Insurance Co. v. Onvia, Inc., 165 Wn.2d 122 (2008)(Even if the Court finds that an insurer had no insurance contractual duties to defend, or to indemnify or to settle with the Plaintiff and hence didn't breach any contract, the insurer can still be found liable for any procedural bad faith and or any unfair and deceptive acts or practices for violation of statutory and regulatory provisions and for other claims including but not limited to violation of the Consumer Protection Act).

sought discretionary review to try to finish the Plaintiff off using the same mobile home sincere belief story on this appellate court in Appeal #29111.

On November 29th, 2010, Allstate went even further and got Judge Sperline to agree and dismiss the first IFCA claim based on Judge Knodell's policy cancellation ruling such that there was no insurance relationship between the parties which created any IFCA duties. CP-1980-1981. However, on January 5th, 2012, just one month before the 5-day, 12-person jury trial set for February 7th, 2012 (CP-1982-1983), a young new associate covering for Allstate over the winter holidays, filed the policy paperwork a third time with the court at CP-2021-2064 but this time Plaintiff just happened to notice it had a few extra pages mixed in that were not there in CP-1157-1187 or in any of Allstate's CR 26(g) certified discovery answers. Those newly disclosed Fisons-like⁶ smoking gun documents (CP-2055,

⁶ Physicians Ins. Exchange v. Fisons Corp., 122 Wn.2d 299, 307-308, 858 P.2d 1054 (1993)(anonymous letter suddenly surfaces a year after settlement - showing the drug company was in fact well aware of toxicity despite all its allegations maintained to the contrary and to its advantage before the truth finally slipped out). See also Meyer v. Sto Industries, Inc., 156 Wn.2d 677, 132 P.3d 115 (2006)(Defendant manufacturer intentionally withheld discovery in order to present false testimony under oath at trial that its product was not flawed when in fact they concealed a previously issued internal memo that the product at issue was "inherently flawed").

2057, 2059), are attached hereto for ease of reference as Appendix D.

This newly discovered and previously withheld evidence confirmed that contrary to Allstate's intentionally fabricated story about a sincere belief in mobile home status, Allstate had received advanced corrected information that the home was not a mobile home, had in fact relied on the corrected information and had issued an undisclosed Amended Policy on June 5th, 2004 correcting the structure type to brick and granting a \$15.00 discount on the premium. Id. This accidental disclosure forced Allstate to explain it by admitting receipt of the 6/04/04 email at CP-2345. This broke the case wide open, and most importantly, it revealed a new and distinct, second violation of IFCA had been perpetrated on Plaintiff who sued for it in Case #12-2-00314-5 at CP-1-18.

On 1/12/12, at CP-2087-2094, Plaintiff immediately requested reconsideration and rehearing of all decisions that had been entered in Allstate's favor, to strike the trial date and all pending motions, and for "amendment of Plaintiff's complaint to supplement to include Allstate's conduct related to misrepresentation of applicable policy provisions during

the pendency of these proceedings”. However, the Court wasn’t even available for a status conference to discuss the impact of the Fisons-like discovery any sooner than March 2013 as indicated at CP-2312-2313 and RP-6, lines 10-24. Plaintiff also moved for summary judgment on coverage and breach of contract at CP-2227-2558. However, all the motions had to be stricken and postponed because they were blocked by the existing policy termination order that was still in force. Allstate’s new fraud consisted of misrepresenting and concealing pertinent facts and policy provisions in direct violation of WAC 284-30-330(1) and WAC 284-30-350 and RCW 48.30.090, starting in February 12th, 2009 and thereafter. This constituted a second, new and distinct violation of the Insurance Fair Conduct Act at RCW 48.30.015(5)(a)and(b) which was actually used to cover up and defend Allstate's first violation of IFCA six weeks earlier - when Allstate refused to settle the claim upon collapse of the bad roof investigation on December 30th, 2008 in direct violation of WAC 284-330(6) and IFCA at RCW 48.30.015(5)(a).

This new IFCA claim was a very serious situation which also implicated the following additional violations: WAC 284-30-580(1)(failure

to deliver a policy within a reasonable time); RCW 48.30.090 (misrepresentation of any policy or circulation of any misrepresented policy); RCW 48.01.030(violation of the duty to be actuated in good faith, abstain from deception, practice honesty and equity in all insurance matters and to preserve inviolate the integrity of insurance); RCW 4.84.185 the duty not to pursue any frivolous claims or defenses; RPC 3.1 (duty of good faith, and the requirement of only pursuing meritorious claims and defenses); RPC 3.3 (the duty of candor toward the tribunal); RPC 3.4 (fairness to opposing counsel, not to obstruct access to evidence, not to alter or conceal or misrepresent evidence); RPC 4.1 (which bars making any false statements of material fact or law, or failing to disclose any material facts necessary to avoid assisting or covering up any criminal or fraudulent acts or other violations of law); CR 11 (that all claims and arguments must be based on true and verified facts and law); CR 26(g)(certification that the discovery produced was true accurate and complete after a diligent search). All of the above explains the sole reason this 3/7/06 insurance claim is entering its tenth year instead of ending back on 12/30/08 without any fraud on the court. Instead, Allstate has forced 450 more pleadings to be filed in Case #07-2-00020-4, 98 more pleadings filed in Case #12-2-00314-5, 21

more pleadings filed in Appeal #291111, 30 more pleadings filed in Appeal #325865, 46 more pleadings filed in this Appeal #327451, and at least 2 pleadings filed in Supreme Court Case #91198-3, and several thousand hours of time spent by the courts and by each of the attorneys involved.

Had the Plaintiff pulled the same stunt and both concealed and fabricated evidence like Allstate did here, Plaintiff and Plaintiff's counsel would have been in violation of RCW 48.30.230, which is a class C felony and would have entitled Allstate to an immediate denial and dismissal of an otherwise completely valid insurance claim on the spot. Allstate v. Huston, 123 Wash. App. 530 (2004). Other Courts encountering the type of gross misconduct and outright fraud engaged in here by Allstate have awarded significant sanctions or default judgments on the spot. Magana v. Hyundai, 167 Wn.2d 570, 584, 220 P.2d 191 (2009); Smith v. Behr Process Corp., 113 Wash. App. 306, 324, 54 P.3d 665 (2002); Mayor v. Sto Industries, Inc., 156 W.2d 677, 132 P.2d 115 (2006); and Fisons, supra.

On May 14th, 2013, by memorandum ruling at CP-2644-2646, over three years after Allstate had convinced Judge Knodell that it had sincerely

believed the home was a mobile home when it sent the mobile home cancellation letter, Judge Knodell finally rescinded his cancellation order after being shown the evidence Allstate had misrepresented and concealed. Judge Knodell pointed out how he now realized that after Allstate inspected the correct home (on 6/29/04), the only real and truly believed reason for cancellation became the alleged roof issue, not mobile home status. CP-2703, para 2, lines 5-8; CP-2773, lines 15-23; CP-2350. On October 8th, 2013, the Court went even further and dismissed Allstate's cancellation defense entirely, finding "as a matter of law that the cancellation of Plaintiff's insurance policy was not effective" by memorandum ruling at CP-2700-2704. On 6/2/04, the memorandum decisions at CP-2644-2646 and CP-2700-2704 were reduced to a Court Order at CP-3095-3105.

On June 2nd, 2014 at CP-3113-3120, the court granted Plaintiff's motion for summary judgment by finding that the policy wasn't cancelled because Allstate never sent a proper cancellation notice with the true and actual real reason for cancellation, that the policy also automatically renewed because Allstate did not send a notice of non-renewal either, and that the fire was a covered loss under the policy, and the fire occurred during

the renewal period of the policy, and that Allstate had breached the contract with damages to be determined later by separate motion or trial. Furthermore, at CP-3121, Judge Sperline's order dismissing the first IFCA claim at CP-1980-1981 was finally reversed and vacated because the policy termination order obtained by the 2nd IFCA violation was reversed. However, that same day the court refused to consolidate and dismissed all the new claims filed for the second IFCA violation at CP-2913-2914 and again on August 8th, 2014 by Order denying reconsideration in Case #12-2-00314-5 at CP-989-990. This appeal was filed on 8/28/14. CP-991-1002

IV. ARGUMENT

A. THE STANDARD OF REVIEW:

1. A trial Court's decision on whether or not to grant a motion to consolidate is reviewed for an abuse of discretion. Hawley v. Mellem, 66 Wn.2d 765, 405 P.2d 243 (1965). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). "A discretionary decision 'is based on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in

the record or was reached by applying the wrong legal standard." State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (emphasis omitted) (internal quotation marks omitted) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

2. Whether or not the doctrine of res judicata properly applies and a plaintiff has engaged in illegal claim splitting thereon are both questions of law reviewed DE NOVO. Landry v. Luscher, 95 Wash. App. 779, 782, 976 P.2d 1274 (1999)(citing to Mountain Park Homeowners Association v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)).

B. The Analytical Framework (Argument and Authority):

1. CONSOLIDATION:

Plaintiff briefed its motion for consolidation at length at CP-2648-2650 and CP-2873-2912 and briefed the issue of Res Judicata and Collateral Estoppel at CP-416-425 and CP-961-964, which are all incorporated herein by reference. The trial court's decision to deny the Plaintiff's motion to consolidate rested on facts unsupported in the record and was reached by applying the wrong legal standard. The Court's decision at CP-2913-2914

incorrectly concluded the Plaintiff had filed two separate lawsuits BASED ON THE SAME EVENT, and thus the Court incorrectly thought the new lawsuit for the second, distinct and severable IFCA violation was illegal claim splitting, a conclusion which was both factually and legally incorrect as explained below. Id.

The Court relied on the case of Notredan, LLC v. Old Republic Exchange Facilitator Co., 875 F. Supp. 2d 780 (W.D. Tenn. 2012); Restatement Second, Judgments sec. 24 for the proposition that Plaintiff Hunter was required “to raise in a single lawsuit all grounds for recovery arising from a series of transactions that can be brought together.” CP-2913. Taking that ruling out of context, the Court concluded: “At the very least, both actions are based on a series of transactions that form a chain of interrelated events that cannot be fully understood in isolation. Therefore, the Defendant Allstate’s motion to dismiss cause number 12-2-00314-5 with prejudice is granted.” CP-2914 (quoting Notredan, supra. at 786 (quoting Lien v. Couch, 993 S.W.2d 53, 56, (Tenn. Ct. App. 1998)).

In Lien v. Couch, the Court examined whether the claims that were

allegedly barred under Res Judicata were in fact compulsory counterclaims that should have been brought with the other counterclaims filed in the first case. Id., at 55. The Tennessee Court quoted the Restatement (Second) of Judgments Section 26(1)(c) comment c (1982) which stated “The general rule [for applying Res Judicata or claim preclusion]. . . is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant’s presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.” Id., at 56.

Plaintiff Hunter faced a similar barrier. The Grant County Superior Court could not hear a plaintiff’s motion to amend the existing 07-2-00020-4 case to add the second IFCA violation because it was blocked by the fact that the Court had already issued standing orders that the policy had been cancelled (per CP-1716-1722) and no IFCA claim could be brought due to the lack of

a policy and the lack of any duties arising from any such policy, as ruled at CP-1980-1981. Any motion to amend would have had to be denied based on the existing orders blocking the same that needed to be reconsidered and reversed first, which took until June 2nd, 2014 at CP-3095-3105 and CP-3121, with Allstate sternly resisting the entire way.

To be sure, when Plaintiff filed the new IFCA claims in case #12-2-00314-5, Defendant Allstate immediately answered at CP-21-35 asserting that Res Judicata and/or Collateral Estoppel barred the Plaintiff's attempt to get the claim filed to beat the statute of limitations, and actually sued the Plaintiff for daring to confront Allstate over its second IFCA violation and fraud on the court. Allstate sought CR 11 sanctions against the Plaintiff not just in their answer to the lawsuit but also at CP-36-50 and CP-232-239. Thus, Allstate agreed Plaintiff could not or should not have filed anything to add the new IFCA claim in the original case unless and until both fraudulently obtained orders blocking the same were reversed and vacated. That BARRIER forced the Plaintiff to file a separate action because the CPA claim for the February 12th, 2009 WAC violations would arguably have run on 02/12/13 per the 4 year statute of limitations at RCW 19.86.120 if

Plaintiff waited to move to amend to add the new IFCA claims in the original case after the June 2nd, 2014 green light.

The Notredan Court also found: “Defendant has not shown that in order to prevail against Johnson in the prior suit, Plaintiff had to necessarily litigate issues regarding the conduct of Regions Bank or that the same conduct of Regions Bank forms the basis for Plaintiff’s claims in this case. Put another way, a finding on the issue of Johnson’s liability in the prior action does not necessarily dictate a finding on the issue of Regions Bank’s liability in this action.” Notredan, supra. at 787 (citing to Hanger Prosthetics & Orthotics East, Inc. v. Henson, 299 Fed.Appx. 547, at 555-56 (6th Cir. 2008) (/case/hanger-prosthetics-orthotics-v-henson?page=555) (“Here, [the plaintiff] brings an action against [a corporation] after having previously litigated the same cause of action against the corporation.”)).

Similarly in the case at bar, the WAC 284-30-330(6) violation that Allstate committed on 12/30/08, for refusing to settle when liability became reasonably clear for which Allstate was sued for on 10/16/09 at CP-1567-1577, was not the same IFCA violation as the WAC 284-30-330(1) and

WAC 284-30-350 violations that Allstate committed six weeks later on 02-12-09. In fact, acquittal on the first IFCA claim founded on WAC 284-30-330(6) would be no defense to liability on the second IFCA claim founded on WAC 284-30-330(1) and WAC 284-30-350 and vice versa.

Once the amended policy was discovered and it became clear Allstate had received advanced notice that the home was not a mobile home, it became clear in this case beyond all argument, that Allstate, in spite of a knowing falsehood regarding the true and actual structure of the home, never had any true and actual underwriting concerns about mobile home status to ever justify cancellation of the policy on the basis of mobile home status or for claiming any compliance with the mandatory cancellation prerequisites set forth at RCW 48.18.290, and WAC 284-30-570, and RCW 48.53.040(1)(b), or the two fully unanimous, both (9-0), Washington State Supreme Court decisions, in Olivine Corp. v. United Capitol Ins. Co., 147 Wn.2d 148, 162-163, 52 P.3d 494 (2002)(failure to comply with the statutory prerequisites to provide proper notice of the true and actual reason cancellation leaves the policy fully intact), and Cornhusker Casualty Ins. Co. v. Kachman, 165 Wn.2d 404, 411, 198 P.3d 505 (2008) (strict compliance with the

cancellation prerequisites is required, and even certified mailing is insufficient because the entire onus is on the insurer and the insured has no duty to retrieve the notice).

This fraud on the court and on the Plaintiff sharply conflicted with the additional requirements of RCW 48.01.030 (the duty “in all insurance matters” to “be actuated in good faith, abstain from deception, and practice honesty and equity in all insurance matters” and to honor the duty of “preserving inviolate the integrity of insurance”.) Moreover, any violation of any provision of the WAC insurance standards is per se unfair and deceptive and is a per se violation of the Consumer Protection Act, pursuant to Van Noy v. State Farm Mutual Auto Ins., 98 Wn. App. 487, 496 (1999)(citing to Industrial Indem. Co. of the N.W., Inc. v. Kallevig, 114 Wn.2d 907, 925, 792 P.2d 520 (1990). Any actions which violate the WAC are of course unreasonable unfounded and frivolous - which in turn is per se Bad Faith pursuant to Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485 (2003), and any violation of these WAC’s is a per se violation of IFCA at RCW 48.30.015(5)(a)and(b).

Under that backdrop and fiduciary duty of good faith governing all insurance matters, RCW 48.18.290 requires 45 days advanced written notice of the true reason for cancelling the policy. WAC 284-30-570 goes further and states the insurer “shall give the true and actual reason for its action . . . The [true and actual] reason why the individual does not meet such underwriting standards is what must be given.” RCW 48.53.040(1)(b) then goes even further to state that the insurer’s notice of intent to terminate must provide “a description of the specific facts JUSTIFYING the cancellation.” (Emphasis added). Those are the high hurdles for Allstate’s affirmative defense of cancellation upon which it bore the entire burden of production and persuasion. Blomquist v. Grays Harbor Medical Service Corporation, 48 W.2d 718, 296 P.2d 319 (1956)(in an action on the policy, cancellation is an affirmative defense and the insurer has the entire burden of proving that the policy was properly cancelled according to all the mandatory prerequisites and requirements of the law).

On March 6th, 2012, based on Allstate’s fraud on the court, Plaintiff filed the new IFCA claim and all causes of action arising thereon, separately under a new cause number (Case #12-2-00314-5) because the four year

RCW 19.86.120 statute of limitations was going to run before the Plaintiff could get a hearing for a motion to amend and also because Plaintiff could not timely vacate any of the orders blocking such a motion. RP-6, lines 1-23. However, on January 27th, 2014 the Court dismissed the new case by memorandum decision at CP-2913-2914. Plaintiff moved for reconsideration but at the reconsideration hearing Judge Knodell again confirmed his confusion over the facts at the urging of defense counsel with regard to the Plaintiff's new and independent, second IFCA claim. The new IFCA claim was based on new and different WAC violations occurring at different point in time as pleaded in Case No. 12-2-00314-5, NOT based on the same event or same WAC violation committed six weeks earlier on the first IFCA violation pleaded in Cause No. 07-2-00020-4. However, Judge Knodell stated as follows: “. . . all these issues you're talking about [these new IFCA claims filed in the new '2012 case], my understanding is that they're being worked through in the other - in the first lawsuit.” RP-11, line 7-12. This was factually incorrect.

The IFCA claim in the first lawsuit was only based on a 12/30/08 violation of WAC 284-30-330(6)(failure to settle when liability became reasonably

clear upon Allstate's realization with mathematical certainty that Allstate had failed to comply with the cancellation prerequisites of RCW 48.18.290 to ever cancel for a bad roof). The new IFCA claim occurred six weeks later on and after 02/12/09 and thereafter based on an entirely different incident (the fabricated mobile home belief story accomplished by withholding and concealing the amended policy and critical correspondence thereon) in violation of WAC 284-30-330(1) and WAC 284-30-350, for Allstate's misrepresentation and concealment of pertinent facts and policy provisions. Plaintiff tried to explain that not only was Plaintiff unable to bring the claims in the original action at the time they were filed in the new action because of court orders that still needed to be reversed first, but these were not identical claims to begin with, although they do generate similar causes of action as counsel explained at RP-7, lines 2-21.

Seizing on the Judge's confusion and eager to avoid RCW 48.30.015(2) treble damages for the second IFCA violation being applied to the treble damages of the first violation, Defense counsel then falsely stated in response to the judge's confusion about the new IFCA claim already being covered in the original case: "Absolutely. I absolutely agree with that,

and that all the same claims are present in the 2007 lawsuit . . . the IFCA claim is even back in the 2007 lawsuit. There is no reason to have a second lawsuit. It's simply duplicative and wasteful, and further complicates what already is such a complicated case . . . I think this further complicates matters. I don't think it adds anything for the Plaintiff. I don't think it gives the Plaintiff any benefit . . . there is absolutely no reason that all of the things that the Plaintiff is concerned about can't be addressed in the suit that has already been before the court since 2007, and is still open." RP-11, line 13 to RP-12, line 6.

Judge Knodell then stated: This is a fascinating case and this case will not be – I don't believe will be decided here at the trial level. This is gonna be decided with the Court of Appeals. But I do believe that procedurally, Mr. Trujillo, these claims that you made and I don't think you acted in bad faith. I want to make it real clear, I don't think you acted in bad faith. I think you had a problem with the statute of limitations. You needed to take some precaution and file this case but I believe these claims can be raised in the '07 cause and should be so I'm going to deny the motion for reconsideration [and stick with the decision to dismiss the new 2012 claims altogether].

RP-15, line 18 to RP-16, line 3.

At RP-16, lines 17-19, the Court went on to state “. . . all of these claims can and should be litigated together under the '07 cause” to which Plaintiff’s counsel replied “Which is why I filed my CR 42 motion.” RP-16, lines 20-21. Then the Court said that “. . . it seems to me that what needs to happen is if it has not been done, you need to just amend the information in the first one [the 2007 case]. . .”. RP-17, lines 1-6. Plaintiff’s counsel then pointed out how that would not be possible at this point in time and stated: “Well, but it does create a statute of limitations problem because if this [is] now dismissed, then I have to refile and its more than four years. And it seems that the cleaner way to do this rather than force me to appeal the dismissal . . ., [is to] just consolidate it.” RP-17, lines 7 to 9 and lines 11-13. However, the Court refused.

2. CLAIM SPLITTING:

Likewise, the lynchpin of Allstate’s claim splitting allegation is the applicability of Res Judicata - based on Allstate’s claim that the court had already reached a final and binding decision on the exact same claims already. This allegation was mooted by the fact that all the prior rulings

that Allstate relied upon were reversed – See again CP-2644-2646, CP-2700-2704, CP-3095-3105, CP-3121. That eliminates the threshold requirement of res judicata – a valid and final judgment on the merits in a prior suit. Ensley v. Pitcher, 152 Wash. App. 891, 899, 222 P.3d 99 (2009)(“The threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit.”).

The claim splitting/res judicata arguments never applied anyhow, because the causes of action pleaded against Allstate in the two different case numbers, were based on two entirely separate counts of violating incidents under different WAC provisions, which occurred over six weeks apart with the second violation actually being used to cover up the first one. Judge Knodell correctly cited the basic 8 factors Allstate was required to establish under Landry v. Luscher, 95 Wash. App. 779, 976 P.2d 1274 (1999)(the practice of claim splitting – bringing two separate lawsuits based on the exact same single event – is prohibited); Sprague v. Adams, 139 Wash. 510, 515, 247 Pac. 960 (1926). However, Ensley v. Pitcher, 152 Wash. App. 891, 222 P.3d 99 (2009), is a 10 years newer case also cited all the same eight Landry list of elements to be considered on whether the apply the Res Judicata based rule against claim splitting.

Ensley actually examined the controversy over whether the claims were the same claims or not, which is the very issue in this case at bar now, and was not dealt with in Landry supra. In Landry, the Plaintiff husband and wife tried to split up their legal claims arising the exact same single incident (a vehicle collision). First, they went into small claims court for the property damage to the car from the collision, and then they sought personal injury damages from the exact same collision by filing a separate superior court case on the exact same facts, which is not an issue with Ms. Hunter's claims. Clearly, having one judge decide issues in the one case and another judge in another could lead to conflicting rulings in that situation, but that is NOT the situation here at all. Interestingly enough, the Landry court actually suggested that the plaintiff should have moved to consolidate - which is exactly what Plaintiff Hunter asked the court for. Landry, at 785-786. Plaintiff Susan Hunter actually tried to do exactly what the Landry Court said is the PROPER thing to do. Under Landry and Ensley, the proponent of res judicata (in this case Allstate) must show the newly proposed case is identical in FOUR COMPLETE RESPECTS to earlier claims that have already been decided in all of the following respects: (1) persons or parties, (2) causes of action, (3) subject matter, and (4) the quality of the persons for or against whom the claim is made.

In the case at bar, the alleged controversy about whether these were the Same Causes of Action, raises the next four part phase of the Landry inquiry on whether the causes of action were the same: (a) would the second action destroy or impair rights or interests established in the first judgment - i.e. - has the first action already decided the very issue at hand in the new claims and or would the rights or interests that were allegedly established in the prior order of Judge Sperline (at CP-1980-1981) be destroyed or impaired by the prosecution of the second action?; and (b) would substantially the same evidence be presented in the two actions - i.e. - is the evidence necessary to prove the different claims identical?; and (c) do the two lawsuits involve infringement of the same right?; and (d) do the two lawsuits arise out of the same transactional nucleus of facts? The answers to (a) and (b) and (c) and (d) are simply no. The issues were distinct and severable.

Then there is the issue of whether there is Identical Subject Matter for the two lawsuits. Ensley supra. at 905, explains that the question is whether the ultimate issue in each case was the same. The original Allstate Case Number 07-2-00020-4, as it was pleaded against Allstate at CP-1567-1577, had never included the claims of misrepresentation or concealment for violations of WAC 284-30-330(1) or WAC 284-30-350 which were only pleaded in Case Number 12-2-00314-5 and

upon which all the new causes of action thereunder were founded. No such misrepresentation and concealment evidence or claims were at issue and no such evidence had ever been or would ever be presented until after the smoking gun evidence of the new violation accidentally surfaced within CP-2015-2064.

The Plaintiff already had the 12/30/08 evidence on RCW 48.18.290 failure to cancel liability and Allstate's WAC 284-30-330(6) violation for refusing to settle which proved the one and only IFCA#1 violation at issue at that time. The case was all set for involuntary resolution by summary judgments that should have been entered in Plaintiff's favor on all counts because the bad roof theory failed. However, on February 12th, 2009, Allstate decided to try to avoid the TREBLE damages on the base damages already owed on IFCA #1, by going on the offensive with a fraudulent termination attack, constituted a new, second and distinct violation of IFCA which Plaintiff refers to as IFCA #2. Allstate now faces a trebling of the trebling they tried to avoid on IFCA #1, all pursuant to RCW 48.30.015(2).

Our courts have held that subject matter is NOT the same even where both lawsuits arise out of the same property transaction, where the first suit was an action for misrepresentation and the second was an action for breach of covenant of title. Mellor v. Chamberlin, 100 Wn.2d 643

(1983). In the case at bar, we have an initial lawsuit for breach of contract, for which liability became clear on 12/30/08 with the discovery of the inspection date making liability mathematically certain. Then we have a second suit for misrepresentation used to try to evade the damages owed on the contract in the original action. As the Courts have made clear, the significant issue over all is whether there were actually TWO (2) separate wrongs. Marshall v. Champman's Estate, 31 Wn.2d 137, 146 (1948)(wrongful and malicious attachment AND thereafter a negligent care of the attached property are two different actionable wrongs and no res judicata applies).

The Restatement (Second) of Judgments, Section 24 (1982) also asks “. . . whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit . . .”. Yet, here we clearly have two different wrongs, two different times, and two different motives, one for not voluntarily settling when the bad roof termination theory fizzled out, and one for going a huge leap further and making up and actually asserting a termination claim against the Plaintiff to destroy the Plaintiff's insurance claim outright.

Lack of ripeness for the new claim in the prior action at the time it was pleaded may also fully warrant the bringing of the second action. -

Mellor v. Chamberlin, 100 Wn.2d 643 (1983). The fraud claims against Allstate did not ripen till they were discovered on 01/05/12, nearly five years after the first action was filed. Moreover, the second action (Case No. 12-2-00314-5) was filed without dragging co-defendant Schlagel into it. To be sure, “res judicata is not intended to deny the litigant his or her day in court.” Luisi Tuck Lines, Inc. v. Utilities & Transportation Commission, 72 Wn.2d 887, 894, 435 P.2d 654 (1967). Furthermore, a court can only apply Collateral Estoppel when “precluding relitigation of the issue will not work an injustice.” Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 731, 254 P.3d 818 (2011); Clark v. Baines, 150 Wn.2d 905, 913, 84 P.3d 245 (2004). Never mind that the Court’s orders in Case #07-2-00020-4 were not final and binding in a multi-claim, multi-party case, under CR 54(b) or otherwise. Res Judicata and claim preclusion each require a “final judgment on the merits”. Hisle v. Tood Pac. Shipyards Corp., 151 Wn.2d 853, 865, 93 P.3d 108 (2004).

V. CONCLUSION

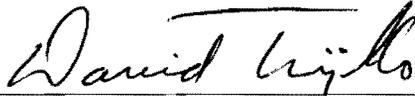
Allstate does not get a free pass after committing a fraud on the court and on Plaintiff by violating WAC 284-30-330(1), WAC 284-30-350, and

IFCA in an unsuccessful bid to dodge insurance obligations and fiduciary duties to Ms. Hunter. Allstate cannot use those violations to obtain fraudulent Court orders that blocked Ms. Hunter's motion to amend and forced the Plaintiff to file a separate action in order to assert proper claims for relief thereon before the statute of limitations ran any of the causes of action. Allstate cannot argue the separate action they forced with their fraud was improper or mandated dismissal of the claims or that consolidation was improper based on false arguments that the claims were identical or that Res Judicata applies at all.

This Court should reverse the order dismissing the claims and remand for the trial court properly reconsider whether consolidation furthers judicial economy and makes sense under CR 42(a). The denial of consolidation and the outright dismissal of the case which was based solely on alleged claim splitting and or res judicata is unsupported by facts or law. There was no final or binding decision in the original case. The new claims were distinct and severable from those in the original case. The claims were not identical or duplicative, and the ruling to the contrary was unjust

and needlessly deprived the Plaintiff of a fair day in court working an injustice and literally patting Allstate on the back for committing a fraud on the court and against the Plaintiff. Appellant Hunter is specifically requesting fees incurred for this appeal to abide by the final resolution of the claims on the merits as prayed for in Plaintiff's complaint in Case #12-2-00314-5 at CP-1-18, and will comply with RAP 18.1 and 14.4 as needed.

Respectfully submitted this 20th day of March, 2015.



DAVID B. TRUJILLO, WSBA #25580,
Attorney for Appellant Estate of Susan Hunter

Appendix A

premiums when billed, and assuming that they were doing their part. they made a terrible error and to make matters worse. they have treated me very shabbily.

LOSS DATE: 03-06-06

PROBLEM DESCRIPTION

: I own and live in a large manufactured home on some acreage. Allstate has carried my homeowners insurance since I put my home in - nearly 8 years ago. A little over a year ago I inherited a large home and furnishings on acreage adjacent to mine. I called my Allstate agent, told him I would be renting out that house, and I needed it to be insured. He quoted me a rate, I sent him a check for a year's coverage, and he mailed me a policy. A couple of weeks later I received a notice from the head company stating that my policy was being cancelled because "they don't insure manufactured homes as rentals", and that they would be sending me a refund. Obviously, they had made a mistake as it is MY home that is manufactured, the other one I had just gotten was made of concrete block. I called my agent. He said "oh, so sorry, I will send the girl back out to inspect the right one". He also said that it was too late to stop the cancellation of the policy and that my refund check was already being issued. He advised me to write him another check for the yearly premium and send it asap so there would be no lapse in coverage, which I did. This spring there was an electrical fire in that home. The house and contents were completely destroyed. When I called to report the fire to my agent I was told that I had no insurance - it had been cancelled a year before. When I reminded him of the mix up at the time, etc, he became quite stressed. He claimed it didn't pass inspection (bad roof, he said) so they couldn't rewrite that policy. He couldn't explain why I hadn't been notified if that was true. I reminded him that I had paid for a year's coverage a second time. His answer - he said "well, I never cashed your check", "I still have it in your file". Basically, he "dropped the ball". Stuck my check in the file, waiting for the inspectors report, I guess, and that was the end of that! In the meantime, I had sent my premium, had a policy in hand, and never received so much as a phone call from him again. Within 3 days after I called him to report the fire he mailed me my check back and said he was sorry. I tried to deal with him and finally had to retain an attorney which has already cost me thousands of dollars. The house is a pile of burnt rubble with a \$200,000 estimate to rebuild or restore it, it's already been over 6 months without the rental income and I can't even get a phone call or letter answered easily. I'm still not sure who is really handling the case as no one wants to say. I am now preparing to file a lawsuit as it seems my only recourse. Can you help?
thanks you.

HOW I HEARD ABOUT THE OIC

: A relative of mine had a problem and you were of great help to her. Got it handled in days and she had been trying for months to no avail.

FULL NAME (SIGNATURE): Susan W Hunter

DATE SIGNED: 9/6/2006

Appendix B

Sent: Tuesday, September 26, 2006 5:32 PM
To: Peterson, Char
Cc: Schlagel, Greg; Schlagel, Greg
Subject: Mrs. Hunter Insurance Commissioner Complaint
Importance: High

Char,

I interviewed Greg in detail regarding this complaint from Mrs. Hunter and a couple of observations were brought up by Greg that I feel need to be written and shared. First of all, Allstate inspected the wrong home and only sent notice to Mrs. Hunter after that fact. Once she notified Greg's agency and together they came to the conclusion Allstate inspected the wrong home, Greg notified Allstate and Property Services to re-order. At that time, I feel we should have reinstated her coverage and after property services found discrepancies with the paint and roof, she should have been sent a corrected copy notifying her of the problems.

Greg and his staff have researched and can not find any evidence that she was sent notice of the reason for cancellation other than the first notice. I honestly see this as a problem that I feel should be addressed as if this would have been the case; I feel this incident may not have happened.

Just a thought for you to maybe pass on,

John

Peterson, Char

From: Bonner, Lisa
Sent: Wednesday, September 27, 2006 1:06 PM
To: Peterson, Char
Subject: RE: Mrs. Hunter Insurance Commissioner Complaint

I talked to the region on this policy and there is no indication that we ever told this customer that the policy would be reinstated. We initially told them that the policy was being cancelled for concerns (even though the wrong house was inspected) once the new inspection came in there were still concerns and the cancellation was never withdrawn. So, we properly notified the customer that coverage would end on 8/7/04 (by sending the cancellation notice). I also checked with the old property services folks as to if they ever noticed the agency and here is there response:

AS FAR AS I REMEMBER WE FAXED THE REINSPECTION REPORT TO THE AGT BUT NOTHING WAS EVER SENT TO THE INSURED ABOUT THE ROOF...THAT WAS THE AGT RESPONSIBILITY TO LET THE INSURED KNOW ABOUT THE ROOF CONDITION...AND IF THE AGT WANTED THE POLICY REINSTATED BACK IN AUG 04 HE WOULD HAVE HAD TO SEND IN PHOTOS SHOWING THE ROOF WAS REPLACED OR A SIGNED CONTRACT SHOWING THE ROOF WAS GOING TO BE REPLACED WITHIN A FEW MONTHS OR WE WOULD HAVE HAD TO SEND OUT FOR A REINSPECTION AGAIN TO THE CORRECT ADDRESS AND IF THE ROOF WAS ACCEPTABLE THEN WE WOULD REINSTATE THE POLICY AND CHANGE THE DWELLING LIMIT
HOPE THIS HELPS
JUDY

It looks as though they did notify the agency and he may have never notified the customer. As far as I can see there was no error on the part of Allstate. I also show that the policy cancelled and a refund check in the amount of \$270.00 was sent back to the insured on 6/14/04. I checked with customer service and the check was cashed on 6/30/04. From everything we have here, the customer was aware that the policy has terminated.

Let me know if you need anything further.

Thanks

Lisa

-----Original Message-----

From: Peterson, Char
Sent: Wednesday, September 27, 2006 2:36 PM
To: Bonner, Lisa
Subject: RE: Mrs. Hunter Insurance Commissioner Complaint

I spoke to the agent and he said that he did not think that the roof had been repaired as she was waiting for the e & o person to call her back....and he never did. I can relate as I have been waiting for his return call for well over a week. I will call his manager right now.

From: Bonner, Lisa
Sent: Wednesday, September 27, 2006 9:25 AM
To: Peterson, Char
Subject: RE: Mrs. Hunter Insurance Commissioner Complaint

Thanks

Appendix C

Schlagel, Greg

From: Schlagel, Greg
Sent: Friday, June 04, 2004 3:24 PM
To: Doyle, Shannon
Subject: RE: Unacceptable New Business Inspection: HUNTER, SUSAN 917132671

hey shannon, weve emailed alot lately! the house we wrote is a solid block house, not a mobile home they must of inspected the wrong place

-----Original Message-----

From: Doyle, Shannon
Sent: Wednesday, June 02, 2004 12:36 PM
To: Schlagel, Greg
Subject: Unacceptable New Business Inspection: HUNTER, SUSAN 917132671
Importance: High

To: GREG SCHLAGEL

RE: Unacceptable New Business Inspection

Policy #: 917132671 Effective Date: 5/11/2004
Insured: HUNTER, SUSAN

We are informing you in advance, of the Customer's notification of cancellation of the policy identified above. We will start the cancellation process 7 days after the above date of this email. The customer will then have 10 - 40 days of coverage before termination, to fix all major conditions or hazards.

*MAJOR: Foundation - Not Continuous Inspector Comments: MOBILE HOME WRITTEN AS A LINE 72

Note to Customer: When these conditions or hazards have been corrected, please contact your agent, who will then contact Judy in Property Services. We will then re-inspect your property. Note: Receipts from contractors verifying that the work needed to correct the conditions or hazards has been completed will be an acceptable alternative to a re-inspection.

Appendix

D

Greg Schlager
205 S Ash Street
Moses Lake WA 98837

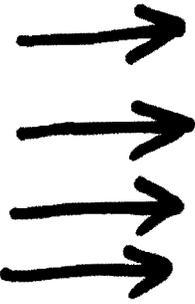
Your Quick Insurance Check

- ✓ Verify the information listed in the Policy Declarations.
- ✓ Please call if you have any questions.
- ✓ File this package safely away.
- ✓ If premium is due or if it has changed, a bill or refund will be mailed separately.



Susan Hunter
253 Briskey Lane
Naches WA 98937-9723

Policy Change Notice



A change has been made to reflect new or corrected information affecting your policy. We want your policy information and your coverage to be up-to-date and accurate.

The change took effect on June 05, 2004. The accompanying Amended Policy Declarations includes this change:

A change in Residence type.

Your premium for this current period has been decreased by a total of \$15.00

The coverages and limits you carry on your policy are listed in detail on the enclosed Policy Declarations. By comparing this Policy Declarations with the most recent Policy Declarations mailed to you, you can see any changes in detail.

If you have any questions or concerns, please contact your agent at (509) 764-8110.

Thanks again—it's a pleasure serving you.

Customer Service Department

Customer Service Department

PROP *010004604060543012430401* 00000917132671 072 010 WA



AMENDED

**Landlords Package
Policy Declarations**

Summary

NAMED INSURED(S) Susan Hunter 253 Briskey Lane Naches WA 98937-9723	YOUR ALLSTATE AGENT IS: Greg Schlagel 205 S Ash Street Moses Lake WA 98837	CONTACT YOUR AGENT AT: (509) 764-8110
POLICY NUMBER 9 17 132671 05/11	POLICY PERIOD Begins on May 11, 2004 at 12:01 A.M. standard time, with no fixed date of expiration	PREMIUM PERIOD May 11, 2004 to May 11, 2005 at 12:01 A.M. standard time
LOCATION OF PROPERTY INSURED 251 Briskey Lane, Naches, WA 98937-9723		

Total Premium for the Premium Period *(Your bill will be mailed separately)*

Premium for Property Insured	\$336.00
TOTAL	\$336.00

The portion of the total premium shown above that is attributable to coverage for losses caused by "acts of terrorism" to which the federal Program established by the "Terrorism Risk Insurance Act of 2002" applies is \$0.00. SEE THE ENCLOSED "POLICYHOLDER DISCLOSURE NOTICE OF TERRORISM INSURANCE COVERAGE" -- AP3337.

Your policy change(s) are effective as of June 5, 2004

PROP *010004604060553012430402*



Allstate Insurance Company

Policy Number: 9 17 132671 05/11 Your Agent: Greg Schlagel (509) 764-8110
For Premium Period Beginning: May 11, 2004

POLICY COVERAGES AND LIMITS OF LIABILITY

COVERAGE AND APPLICABLE DEDUCTIBLES (See Policy for Applicable Terms, Conditions and Exclusions)	LIMITS OF LIABILITY	
Dwelling Protection • \$500 All Peril Deductible Applies	\$128,138	
Other Structures Protection • \$500 All Peril Deductible Applies	\$12,814	
Personal Property Protection - Reimbursement Provision • \$500 All Peril Deductible Applies	\$10,000	
Fair Rental Income Protection	Refer to Policy	
Liability Protection	\$100,000	each occurrence
Premises Medical Protection	\$1,000	each person
Fire Department Charges	\$500	



RATING INFORMATION

The dwelling is of Brick construction and is occupied by 1 family

Appendix

E

“There is no dispute about that that – that Miss Hunter’s policy was canceled because of the mobile home issue. That’s not a made up fact. Allstate did not cancel her policy for any reason other than they thought it was a mobile home.” CP-2306, lines 12-16.