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COURT OF APPEALS
DIVISION III
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NO. 327451-III

Grant County Cause No. 12-2-000314-5

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

THE ESTATE OF SUSAN HUNTER,

Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT'S BRIEF

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I. INTRODUCTION

This appeal stems from the dismissal of a duplicative lawsuit filed by Plaintiff in 2012 after her claim for violation of the Insurance Fair Conduct Act (IFCA), RCW §48. 30.015, was dismissed in her initial cause of action filed in 2007. Respondent Allstate is cross-appealing the trial court's refusal to award CR 11 sanctions when it dismissed Plaintiff's second lawsuit.

The dismissal of the 2012 lawsuit was proper because Plaintiff sought the exact same relief against Allstate in the 2012 lawsuit that she had sought in the 2007 lawsuit. CR 11 sanctions should have been awarded because filing a duplicative lawsuit is frivolous.

Plaintiff erroneously argues on appeal that the trial court erred in dismissing the 2012 lawsuit and/or in refusing to consolidate the 2012 lawsuit with the 2007 lawsuit, because the 2012 lawsuit was filed based upon a "new and distinct" incident giving rise to a purported second claim for violation of the IFCA. This "new and distinct" incident allegedly occurred when Allstate made an inadvertent discovery error in the 2007 case by failing to provide the "Amended Landlord's Package Policy Declarations." Appellant's Brief at 26. However, instead of bringing this discovery issue to the trial court's attention for sanctions or other relief

thereon, Plaintiff improperly filed a second lawsuit.

Plaintiff's "new and distinct" IFCA violation is an untenable claim under Washington law because: (1) IFCA was not enacted at the time of loss and is not retroactive in application; and (2) the conduct allegedly giving rise to the "new and distinct" IFCA violation occurred post-denial and after the inception of the 2007 litigation. Washington law holds that a claim under the IFCA cannot be based on post-denial conduct or conduct occurring during litigation. As such, Plaintiff's "new and distinct" claim is frivolous. Plaintiff's 2012 lawsuit was frivolous and this appeal itself is frivolous. Accordingly, the trial court properly dismissed the 2012 suit but erred in failing to sanction Plaintiff/Appellant under CR 11.

Allstate is requesting that this Court award CR11 sanctions for all fees and costs incurred at the trial court level regarding the 2012 lawsuit and for all fees and costs incurred on appeal.

II. ANSWERS TO ASSIGNMENTS OF ERROR

A. The trial court did not abuse its discretion by refusing to grant Plaintiff's CR 42(a) Motion to Consolidate because Plaintiff's purported claim for a "new and distinct" IFCA violation arose post-denial, during litigation, and post-litigation conduct cannot form the basis for extra-contractual claims.

- B.** The trial court did not err by dismissing Plaintiff's 2012 lawsuit under the claim splitting doctrine because the lawsuit arises from the same set of facts, concerns the same series of transactions, and alleges the same claims against Allstate as the 2007 lawsuit.

III. ALLSTATE'S ASSIGNMENT OF ERROR

- A.** The trial court erred in refusing to sanction Plaintiff when the undisputed facts show that Plaintiff's second lawsuit is wholly duplicative of her first lawsuit and filed frivolously in violation of CR 11.

IV. RESTATEMENT OF CASE

On March 6, 2006, Susan Hunter suffered a fire loss of her rental home located at 251 Briskey Lane in Naches, Washington. Ms. Hunter reported the loss on March 7, 2006, and filed a claim on March 13, 2006. The claim was denied because Ms. Hunter's Allstate Landlord's Package Policy (hereafter "the Policy") was cancelled on August 7, 2004. CP 1154-1156.

Plaintiff sued her insurance agent under Grant County Superior Court Cause No. 07-2-00020-4, on January 4, 2007, alleging breach of contract, bad faith, and breach of the Washington Consumer Protection Act (CPA). CP 1004-1011. Respondent Allstate was added as a defendant in

June of 2008. *Id.* After the enactment of the IFCA on December 6, 2007, Plaintiff successfully moved to amend her Complaint in February of 2009 to add a claim for violation of the IFCA. CP 1567-1577.

The causes of action pled against Allstate in Plaintiff's Amended Complaint dated October 15, 2009 are as follows: (1) breach of contract and duty of good faith and fair dealing; (2) bad faith; (3) violation of the CPA; and (4) violation of the IFCA. CP 1569-1577. Plaintiff's Prayer for Relief asks for attorney's fees and treble damages pursuant to the IFCA. CP 1576.

Plaintiff's IFCA claim against Allstate was dismissed on November 27, 2010. CP 1980-1981. The 2007 litigation is ongoing. After the dismissal of the IFCA claim, Plaintiff brought a second suit under Grant County Superior Court Cause No. 12-2-00314-5 on March 5, 2012. CP 1-18. The causes of action pled against Allstate in this second suit are as follows: (1) breach of contract and duty of good faith and fair dealing; (2) bad faith; (3) violation of the CPA; and (4) violation of the IFCA. *Id.* These causes of action arise from the same set of facts alleged in Plaintiff's Amended Complaint in Cause No. 07-2-00020-4 – namely the fire loss claimed by Plaintiff and the denial of coverage by Allstate. CP 1569-1577;

CP 1-18. Importantly, Plaintiff re-alleged her already dismissed IFCA violation in the second suit. CP 7-8.

Plaintiff contends that the second lawsuit was filed for a “new and distinct” incident giving rise to a second claim for violation of the IFCA. This “new and distinct” incident occurred when Allstate made an inadvertent discovery error in the 2007 case. Allstate filed for summary judgment dismissal of Cause No. 12-2-00314-5 on the bases that the suit was barred by res judicata, and because post-litigation conduct cannot give rise to extra-contractual claims against an insurer. The trial court dismissed Cause No. 12-2-00314-5 with prejudice on June 2, 2014, finding that the plaintiff engaged in improper claim splitting. CP 2913-2914. A subsequent motion for reconsideration was denied on August 8, 2014. Plaintiff/Appellant appeals this dismissal.

V. ARGUMENT

1. Dismissal Was Proper Because Plaintiff’s 2012 lawsuit is Duplicative and Frivolous.

The doctrine of claim splitting bars a party from subsequent litigation when the same controversy has already been sued upon. *Single Chip Systems Corp. v. Intermec IP Corp.*, 495 F. Supp. 2d 1052, 1058 (S.D. Cal. 2007). The main purpose behind the rule preventing claim splitting is

to protect the defendant from being harassed by repetitive actions based on the same claim. *Clements v. Airport Authority of Washoe County*, 69 F. 3d 321, 328 (9th Cir. 1995). The rule against duplicative litigation is distinct from, but closely related to, the doctrine of res judicata, but both serve to protect parties from vexatious and expensive litigation. *Adams v. State Dep't of Health Servs.*, 487 F.3d 684 (9th Cir. 2007).

In *Adams*, the plaintiff brought an action alleging civil rights violations arising out of an employment dispute. *Id* at 686-87. After the district court denied plaintiff's motion to amend her complaint as untimely, plaintiff's original claims proceeded to trial and a jury returned a verdict for the defendants. *Id* at 687. When the plaintiff filed a second action, which asserted some additional claims and additional defendants, the district court dismissed the second case with prejudice because it was duplicative of the first. *Id*. In affirming the district court, the Ninth Circuit explained:

Plaintiffs generally have "no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant."...in assessing whether the second action is duplicative of the first, we examine whether the causes of action and relief sought, as well as the parties or privies to the action, are the same.

Id at 688-690 (citations omitted).

The Ninth Circuit concluded that the trial court did not abuse its

discretion in dismissing the later-filed action with prejudice. The Court emphasized that the plaintiff had a full and fair opportunity to litigate her claims in the first action. *Id* at 693.

The doctrine against claim splitting is recognized in Washington. *Landry v. Luscher*, 95 Wn. App. 779 (1999). In *Landry*, the Court stated: “The rule against splitting causes of action is for the benefit and protection of the defendant.” *Id* at 9-10. The defendant must be aware of a second suit for the same cause of action. *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 4 Wn. App. 49, 51-52, 480 P.2d 226 (1971); *Brice v. Starr*, 93 Wn. 501, 503-07, 161 P. 347 (1916).

Landry held that dismissal under the doctrine of claim splitting is appropriate where a subsequent action is identical with a prior action in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made. *Landry* at 783.

In the present case, Plaintiff’s 2012 lawsuit is wholly duplicative of the 2007 suit. The Complaints are practically identical. Plaintiff’s counsel admitted as much during oral argument on Allstate’s motion for dismissal. When asked by the trial court whether Plaintiff was seeking exactly the same relief as the 2007 lawsuit, Plaintiff’s counsel simply

responded “Yes, that’s the overlap.” Appendix A at 67.

A. Analysis of the *Landry* Factors

In dismissing Plaintiff’s 2012 suit, the trial court properly analyzed the *Landry* factors for the reasons that follow.

i. Persons & Parties Identical

In both suits, the persons and parties are identical. Both suits name Plaintiff Estate of Susan Hunter and Defendant Allstate. Accordingly, element one of the *Landry* test is satisfied.

ii. Quality of the Persons Identical

Where the parties are identical, the quality of the persons for or against who the claim is made must be considered. Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805, 812-13 (1985). Where the relationship between the parties is adversarial, this element is satisfied. *Landry*, supra, at 785. Accordingly, element four of the *Landry* test is similarly satisfied.

iii. Subject Matter is Identical

In considering whether the subject matter is the same, the critical factors are the nature of the claim or cause of action and the parties. *Hayes v. City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179, 943 P.2d 265 (1997). Here, the nature of the claim was identical in both actions. In both suits,

Plaintiff sued Allstate under identical theories of recovery for denial of her insurance claim after a fire loss. Accordingly, element three of the *Landry* test is also satisfied.

iv. The Cause of Action is Identical

Plaintiff contends that the cause of action in the second suit is different. Appellant's Brief at 45. Under *Landry*, this implicates four additional elements: (1) Would the second action destroy or impair rights or interests established in the first judgment? (2) Is the evidence presented in the two actions substantially the same? (3) Do the two suits involve infringement of the same right? (4) Do the two suits arise out of the same nucleus of facts?. *Landry* at 784. Appellant concludes, without any analysis, that the answer to each of these four questions is "simply no." Appellant's Brief at 45.

The reverse is true. The second suit, filed after dismissal of Plaintiff's IFCA claim in the 2007 suit, substantially impaired the rights of Allstate because it forced Allstate to defend a previously dismissed claim. The evidence presented in both actions is substantially the same because both actions arose from the same subject matter, contained the same factual allegations, and the same causes of action. In both cases, Plaintiff seeks redress against Allstate under the theories of breach of contract, bad faith,

violation of the CPA, and violation of the IFCA for a denial of coverage following a fire loss. Accordingly, Plaintiff sued for infringement of the same right in both actions – the rights she alleged she was due under the policy. Finally, there can be no question that both lawsuits arose from the same nucleus of facts. In the trial court’s own words, “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.” CP 2913-2914.

Plaintiff’s assertion that there are “new claims” in the 2012 lawsuit, or that the 2012 lawsuit is based on “new facts” because of an alleged violation of the IFCA that occurred during litigation of the 2007 lawsuit fails to recognize established Washington law that does not allow claims for conduct occurring post-denial of coverage or during litigation. *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 698 P.2d 578 (1985). These issues are fully briefed in subsections 3 and 4 below.

B. *Landry* Requires Dismissal

To dismiss Plaintiff’s present appeal, this Court need look no further than the identical nature of the 2007 and 2012 lawsuits. Under the *Landry* factors outlined above, and the fact that Plaintiff filed her 2012 lawsuit after dismissal of her claim for violation of the IFCA in the 2007 lawsuit, there is

no question that the 2012 lawsuit is precisely the type of claim splitting prohibited under Washington and federal law.

Furthermore, Plaintiff's initial claims for bad faith, violation of the CPA, and violation of the IFCA are all still pending under Cause No. 07-2-00020-4, because the dismissal of Plaintiff's IFCA claim was subsequently reversed. Accordingly, the 2012 suit does not add any new claims. Plaintiff will still have her day in court on breach of contract, bad faith, breach of the CPA, and violation of the IFCA. Furthermore, Plaintiff could still seek to further amend her Complaint in the 2007 lawsuit.

Plaintiff maintains that dismissal was improper because the reversal of orders in the 2007 case removed the "lynchpin" of Allstate's res judicata argument because there was no valid and binding judgment. This argument fails because the trial court dismissed Plaintiff's suit under the doctrine of claim splitting which is related to, but separate from, res judicata. See *Adams*, 487 F.3d 684 supra. Reviving Plaintiff's IFCA claim ensured identity of claims between the two suits.

Filing two separate lawsuits based on the same event, ie. claim splitting, is precluded in Washington. *Landry*, supra. *Landry* explicitly contemplated suits pending at the same time. In fact, the Court in *Landry* held that defendants had not waived the defense of claim splitting because

the Landry's suits were not pending at the same time. Therefore, the trial court's dismissal of Plaintiff's second suit was required to ensure that two trial courts did not arrive at different conclusions regarding the same claims.

Furthermore, at the time Plaintiff filed her second suit, res judicata would have been operable because at that time a final adjudication of Plaintiff's IFCA claim existed. "Summary judgment as to part of an action may be made final under Civil Rule 54(b) and then is final for preclusion purposes as well as appeal purposes." *Ensley v. Pitcher*, 152 Wn. App. 891, 901, 222 P.3d 99 (2009) quoting 18A Charles Alan Wright et al., Federal Practice and Procedure § 4444, at 297-99 (2d ed. 2002). However, "[t]here also may be circumstances in which expanded modern views of finality warrant preclusion on the ground that there is no apparent reason to anticipate reconsideration and that the alternative of denying preclusion would entail substantial costs." *Id.* Accordingly, summary judgment in a prior action is sufficient to invoke res judicata. *Ensley*, supra.

Finally, Allstate notes that Plaintiff attempts to "incorporate by reference" her briefing at CP 2873-2912, CP 416-425, and CP 961-964. Appellant's Brief at 31. The attempt to "incorporate" pleadings is impermissible because RAP 10.4 (b) restricts an Appellant's Brief to 50

pages. Accordingly, this Court should not consider this improper argument and strike any attempt to “incorporate” pleadings.

Plaintiff’s 2012 lawsuit is wholly duplicative and barred by Washington law regarding claim splitting. It wastes limited judicial time and resources. Accordingly, dismissal was proper.

2. Initiating Cause No. 12-2-00314-5 Was Frivolous & Sanctionable

Respondent Allstate cross-appeals the trial court’s denial of CR 11 sanctions in its Motion for Dismissal. CR 11 provides, in pertinent part, that an attorney’s signature on a pleading certifies that:

- (1) it is well grounded in fact;
- (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

CR 11(a)(1)-(3).

When Plaintiff filed Cause No. 12-2-00314-5, she violated CR 11 because the suit was wholly duplicative and, therefore, frivolous. Plaintiff sued under the exact same theories of recovery on the same facts that were being litigated in the 2007 suit after receiving an unfavorable ruling on her

IFCA claim in the initial lawsuit. CP 1980-1981. Plaintiff's Motion to Consolidate, filed on June 12, 2013, recognizes that common questions of law and fact predominated between the two suits. CP 2648-2650.

To determine that Plaintiff's second lawsuit was frivolous, this Court need only examine the report of proceedings transcripts from oral argument on Allstate's Motion for Summary Judgment and Dismissal, and Plaintiff's Motion to Consolidate. Verbatim Report of Proceedings, February 25, 2013, September 9, 2013, January 8, 2014, June 2, 2014, Volume I. Plaintiff asserts on appeal that, "clearly having one judge decide issues in the one case and another judge in another could lead to conflicting rulings...but that is NOT the situation here at all. Appellant's Brief at 44. This contention is surprising because during oral arguments Plaintiff's counsel repeatedly admits that the two actions "overlap" and that there's "only one relief" being sought between the two suits. For example:

THE COURT: As I read the -- as I read the Complaint though, a lot of the relief that's sought in this Complaint is the same relief that is sought in the first Complaint.

MR. KINKLEY: It does overlap and it should be consolidated for that reason, but we have to make those conditions precedent.

THE COURT: Okay.

MR. KINKLEY: What is different is what's important.

And maybe the drafting could be better and say, we need '07 decided and then we'll get to this.

THE COURT: Okay.

MR. KINKLEY: But look, we don't have an IFCA claim if there isn't coverage in my view.

THE COURT: Okay.

MR. KINKLEY: I don't think that -- if you don't have a relationship with an insurance company that you can have an insurance company fairness violation. Well, that's fine but -- so that's the problem, that '07 has to be decided whether there's coverage. So, there is that overlap. If you want us to amend that Complaint to say all this other stuff needs to be decided in '07, that to me, is not the important part. Maybe it's sloppy drafting, I don't know. The important part -- well, I have to take that back. I know why we drafted it that way. **We had some concerns that the '07 case would go ahead and go to trial, be dismissed, and we would be in the Court of Appeals on that so we needed this case to continue in the way that it would. But, I don't disagree that there's some overlap. I don't disagree that there's only one relief.** I also point out in my own defense that I did move to consolidate so that we could bring them together and the issues that are in '012 are '012 IFCA issues and that's really all we're asking for. We're saying very, very, very simply that when -- who filed the false affidavit in '09?

Verbatim Report of Proceedings, February 25, 2013, September 9, 2013, January 8, 2014, June 2, 2014, Volume I at 60-62 (emphasis added).

THE COURT: Well you say it's irrelevant but -- or that -- that it's relevant if there's an overlap but here, for example, you're asking in the '12 cause you're asking, for example, for a declaratory judgment declaring that the insurance policy was in effect at the time of the fire, right?

MR. KINKLEY: Right.

THE COURT: Isn't that exactly what you're asking for in the –

MR. KINKLEY: Yes, that's the overlap. And that's why we moved to consolidate.

THE COURT: Okay. But it's true isn't it; you can't just bring two lawsuits?

MR. KINKLEY: I -- we get one relief, we get one determination. Those should be consolidated. If you're not gonna [sic] consolidate, you should require us to amend the policy and strike all those things and maybe we wait for '07 to be decided.

Id at 66 (emphasis added).

THE COURT: Is -- Mr. Kinkley, were you -- were you finished?

MR. KINKLEY: Yeah.

THE COURT: Okay.

MR. KINKLEY: My -- my point is this -- that I don't disagree that there's some overlap. We have conditions precedent to make an IFCA claim, and so the Complaint included those with the anticipation and expectation that '07 and '012 would be joined or that '07 would determine those things. I mean, there's really -- there's -- really, the question of coverage is an '07 question. Once you determine that -- just a second, David. Once you determine that -- if you determine it in the favor of the Plaintiff, then we turn around and we say in '012, that's already been determined. We don't need to make another motion.

THE COURT: Okay.

MR. KINKLEY: I mean, and that's the idea of it and I don't know, maybe there's a better artful way to do it than we did it, but that was the intent. Just one second. Yeah, there's -- let me just say it though for you. Yes, I understand. There is some --

THE COURT: The first IFCA is premised upon actions the company took -- Allstate took between '04 and '06.

MR. KINKLEY: That's right.

THE COURT: And this one is since the inception of the litigation, which I think was in '09. Is that right?

MR. TRUJILLO: It arose in March of '09.

MR. KINKLEY: The litigation arose in -- just a second. This litigation arose in '07 but the actions actually first -- the ones I highlighted for you were '09.

Id at 68-69.

THE COURT: Okay. So, the problem here -- you filed the second lawsuit to avoid the -- the procedural difficulty. So, let's just put it that way.

MR. KINKLEY: Right -- and timing and procedural. And like I mentioned before, it's tough to get a hearing over here. And if you notice in this file, in '07, we filed a Motion to Amend the Plaintiff's Complaint to include these later occurring actions. **Technically it should have been a Motion to Supplement the Pleadings.** When something occurs after the filing of the Complaint, that in itself is a new cause of action, the best practice -- what I do in federal court is move to supplement. Sometimes we'll do what we did here is file a new lawsuit and move to consolidate. And we moved to consolidate right away, as soon as we filed the second Complaint. And both Defendants -- we moved to

amend and both Defendants opposed that.

THE COURT: Right.

Id at 155-156 (emphasis added).

MR. KINKLEY: All right. So, the point is this – we have not split the causes of action. We have two cases that require some of the same facts and so they should be consolidated.

THE COURT: Okay.

MR. KINKLEY: And that's the proper remedy. It's not like this is Johnny Come Lately or we tried to gain some advantage, because we did this from early on. Back in January 2012 when we filed the second lawsuit we also made a Motion to Amend and that was opposed. And because we couldn't get hearing dates to get to whether or not we could amend or supplement the Complaint, we had to get the second lawsuit filed because of the deadlines imposed by IFCA. And then, you know, we made a Motion to Consolidate along the way and it never got heard until now. **And that's all I'm saying is -- I don't disagree that there is a potential problem with deciding -- you could decide in '07 that there was a contract and '012 there wasn't. And without coverage, we have neither.**

THE COURT: This is one of the things that bothers me about this motion. I mean, I -- it appears to me -- and I'll hear from Mr. Leid. I, of course, will keep an open mind, but it appears to me that if you look at Rule 42, yeah, these actions involve a lot of the same facts, so it makes a lot of sense to join these, but if I were to do that, would I not essentially be in substance overturning or overruling the previous Order, which denied amendment? Was I -- was I the judge who did that?

MR. KINKLEY: No. The amendment was never heard.

Id at 161-162 (emphasis added).

MR. KINKLEY: Then you have common law bad faith. Then you have Consumer Protection Act violation case. And now after December of '07, you have an IFCA case.

THE COURT: All right.

MR. KINKLEY: Those are the four parts that you will see nowadays in any bad faith, failure of coverage to provide coverage case.

THE COURT: Okay.

MR. KINKLEY: And all we're doing is pulling in '09 facts and '09 violation into the '07 case. And it makes sense to hear them both together.

THE COURT: All right. Thank you, Mr. Kinkley. Mr. Leid.

Id at 164-165.

These admissions from Plaintiff's counsel make clear that Plaintiff's 2012 action was filed based upon the same facts and asserted the same causes of action against Allstate. Accordingly, the lawsuit was frivolously filed and the trial court erred in failing to sanction Plaintiff under CR 11.

Importantly, while Plaintiff mentions that she moved to amend her Complaint in the 2007 suit, she did so without any briefing. CP 2309-2311. Accordingly, the motion was never heard. It was Plaintiff's

responsibility to ensure that her motion was noted properly so that it could be heard timely. Plaintiff's failure to do so is no basis for filing a second suit.

In addition, Plaintiff filed to consolidate after Allstate filed its Motion to Dismiss Cause No. 12-2-00314-5 on March 9, 2012, seeking CR 11 sanctions. In that Motion, Allstate argued that the suit of *Hunter v. Allstate*, Cause No. 12-2-00314-5, had no merit whatsoever, and must be dismissed. Accordingly, Plaintiff was on notice that her action was frivolous. Plaintiff's attempt to consolidate thereafter was nothing more than an attempt to avoid CR 11 sanctions. Because the trial court erred in failing sanction Plaintiff for filing a frivolous suit, Allstate appeals for instatement of same.

3. Sanctions for Frivolous Appeal

Plaintiff now goes even further in appealing the trial court's proper dismissal of her duplicative 2012 lawsuit. The trial court's June 2, 2014, orders reinstating Plaintiff's IFCA claim in the 2007 suit and denying Plaintiff's motion to consolidate the 2012 suit should have been the end of this issue. CP 3121; CP 2913-2914. The order denying consolidation was proper because after Plaintiff's IFCA claim was reinstated in the 2007 suit, complete identity of claims existed between the two cases.

Nonetheless, Plaintiff appeals the trial court's correct decision not to consolidate.

RAP 18.9 provides, in pertinent part:

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, **files a frivolous appeal**, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

RAP 18.9(a).

Plaintiff has filed a frivolous appeal wasting this Court's resources and causing an extreme waste of time and money. Plaintiff's appeal is not well grounded in existing law, or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.

At this point in the litigation, Plaintiff has exactly the relief she sought by filing her motion to consolidate – all of her extra contractual claims in the 2007 lawsuit survive. Plaintiff's appeal is solely based on the untenable argument that a second IFCA violation occurred during the litigation of Cause No 07-2-00020-4. For the reasons that follow, this argument does not comport with well-settled Washington law. This appeal based thereon is frivolous and sanctionable.

4. IFCA is Not Retroactive and Does Not Apply to Post Denial Conduct.

Plaintiff's claim for any violation of the IFCA, RCW §48.30.015, is untenable as a matter of law because the statute is not retroactive. Plaintiff concedes Allstate denied her claim on April 7, 2006. It is undisputed that the IFCA became law on December 6, 2007, over one and one half years after denial of Plaintiff's claim. While Washington State Courts have yet to rule on the IFCA, Federal Courts interpreting the same have unanimously held that the IFCA is not retroactive in application, nor can post-denial conduct form the basis of an IFCA violation. *HSS Enterprises, v. Amco Ins. Co.*, 2008 U.S. Dist. LEXIS 31659 C06-1485-JPD (W.D. Wash. April 16, 2008); *RSUI Indemnity Co. Inc. v. Vision One, LLC*, 2009 U.S. Dist. LEXIS 118425 C-08-1386RSL (W.D. Wash. December 18, 2009).

Nevertheless, Plaintiff here argues for a "prospective" application of the IFCA, based on conduct that occurred nearly two years after litigation commenced, and almost three years after Plaintiff's claim was denied. Specifically, Plaintiff argues that a discovery error, the failure to provide "Amended Landlord's Package Policy Declarations," gives rise to a claim under the IFCA. Appellant's Brief at 26. According to Plaintiff, this

constitutes a “new and distinct” violation of the IFCA. *Id.*

This argument was specifically rejected in *HSS Enterprises v. Amco Ins. Co.*, 2008 U.S. Dist. LEXIS 31659 (W.D. Wash. April 16, 2008). In *HSS Enterprises*, Plaintiff argued that even if the IFCA does not apply retroactively, it should be permitted to assert claims against the defendant for failure to pay benefits and other unreasonable conduct occurring after December 6, 2007. *Id.* The court disagreed, reasoning that “this argument necessarily relies on pre-IFCA enactment grounds for a present – and allegedly a continuing IFCA violation. Such an argument not only raises serious continuing tort and statute of limitations concerns, but it also invokes the same retroactivity position ... already rejected.” *Id.* at 10.

Furthermore, in *RSUI Indemnity Co. Inc. v. Vision One, LLC*, 2009 U.S. Dist. LEXIS 118425 C-08-1386RSL (W.D. Wash. December 18, 2009), Defendants conceded that the IFCA was not retroactive, but argued that the statute applied because coverage was denied and alleged bad faith conduct occurred after enactment. *Id.* The *RSUI* court immediately rejected this argument holding that, “the operative date for determining whether the IFCA applies is the date that a claim for coverage is denied. *Id.* at 6 (citing *Pacific Coast Container, Inc. v. Royal Surplus Lines Ins. Co.*, 2008 U.S. Dist. LEXIS 108426 8-278MJP (W.D Wash. 2008) and *Scanlon*

v. Life Ins. Co of N. Am., Case No. 2008 U.S. Dist. LEXIS 108045 C08-256JCC (W.D. Wash. 2008).

Accordingly, if a denial of coverage occurred prior to December 6, 2007, there is no cause of action under the IFCA. Plaintiff in this case has no claim for violation of the IFCA because it is undisputed that denial occurred before enactment and IFCA is not retroactive.

5. Post-Litigation Conduct Cannot Form the Basis of Extra-Contractual Claims.

A violation of the IFCA is an extra-contractual claim, created by statute, similar to a claim for violation of the Washington CPA. Post-lawsuit conduct cannot give rise to a violation of the WAC governing claims handling procedures. *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 921, 32 P.3d 250 (2001); *Blake v. Fed. Way Cycle Ctr.*, 40 Wn. App. 302, 312 (Wash. Ct. App. 1985). Plaintiffs in Washington may not predicate CPA claims on post-litigation conduct because post-litigation conduct, “does not occur within the sphere of trade or commerce.” *Id.*

The *Blake* Court stated:

Not only do we conclude that the events occurring after the lawsuit was commenced are not "unfair" within the meaning of the Consumer Protection Act, but we also conclude that such events do not satisfy the requisite element that such acts be "within the sphere of trade or commerce." **Once the lawsuit was filed, this matter was under the aegis of and**

subject to the control of the courts; as such, it was a private dispute.

Blake, 40 Wn. App. at 312 (internal citation omitted) (emphasis added).

In *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 921 (2001), Plaintiffs argued that the deceptiveness of witnesses testifying for Wal-Mart could have constituted an unfair or deceptive practice. The Washington Supreme Court flatly rejected this argument. The Court stated, “The act or practice must relate to out-of-court conduct. Lies during court testimony about prior events, while reprehensible, would not constitute a CPA violation.” *Id.*

Pursuant to *Blake* and *Guijosa*, any event following January 4, 2007, the date Grant County Cause No. 07-2-00020-4 was filed, cannot form the basis of Plaintiff’s extra contractual claims, including any claim for violation of the IFCA.

Federal courts in Washington have specifically analyzed whether post-litigation conduct can give rise to WAC violations and the answer is clear: it cannot. Filing a lawsuit against an insurer “effectively halts any claims settlement process.” *Stegall v. Hartford Underwriters Ins. Co.*, 2009 U.S. Dist. LEXIS 2690 4:08CV3252 (W.D. Wash. 2009) at 7. The *Stegall* Court held:

Washington courts have only applied WAC 284-30-330(2) and 284-30-360(3) in circumstances where an insurer failed to respond to a claim-related inquiry made before litigation against the insurer was initiated. ***When Plaintiffs filed this action, they effectively halted any claims settlement process and subjected themselves to the rules governing litigation.***

Id. (internal citations omitted) (Emphasis added.)

In *Stegall*, Plaintiff argued that the claims process is ongoing even after a lawsuit is filed, and that the unfair claims handling practices defined in WAC 284-30-330 apply. *Id.* at 5. The court flatly rejected this argument, holding that the Federal Rules of Civil Procedure governed the litigation, not the administrative code. *Id.* at 6. Specifically, the court held that the WAC does not apply to inquiries and settlement negotiations during the course of litigation. *Id.* at 7.

In *Bronsink v. Allied Prop. & Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 56159 C09-751MJP (W.D. Wash. June 8, 2010), the court held that once a complaint is filed, an insurer's duty to investigate in accordance with WAC regulations, "becomes subordinate to their litigation responsibilities." *Id.* at 11. In *Navigators Ins. Co. v. Nat'l Union Fire Ins. Co.*, 2013 U.S. Dist. LEXIS 109903 C12-13-MJP (W.D. Wash. Aug. 5, 2013), the court held that after suit was commenced, the insurer no longer had a duty to send

written acknowledgement of pertinent communications under the WAC.
Id at 23.

Pursuant to *Stegall*, supra, by filing this case Plaintiff “halted any claims settlement process and subjected [herself] to the rules governing litigation.” *Stegall*, 2009 U.S. Dist. LEXIS 2690 at 7. *Stegall* contemplated application of the WAC to litigation broadly. The court’s express language is clear – there can be no WAC violations after litigation has commenced.

In the present case, Plaintiff contends that Allstate’s post-litigation conduct violated WAC 284-30-330(1) and WAC 284-30-350. On the basis of these alleged violations, Plaintiff filed a second suit under Grant County Cause No. 12-2-00314-5, the dismissal of which forms the basis of this appeal. It is undisputed that these alleged WAC violations occurred during the pendency of the 2007 suit, Grant County Cause No. 07-2-00020-4. Accordingly, Plaintiff has no claim for violation of the IFCA where the alleged conduct giving rise to such a claim occurred post-litigation.

VI. CONCLUSION

Plaintiff’s 2012 lawsuit is wholly duplicative and the trial court properly dismissed it under the doctrine of claim splitting. The trial court

did not err in refusing to consolidate the cases because all of Plaintiff's causes of action remain to be adjudicated in the 2007 action. To the extent that Plaintiff argues that the 2012 suit contains a new claim, her argument is unsupported by Washington law and Plaintiff has cited no authority to the contrary. Both the initial 2012 suit and this appeal were frivolous as a matter of law. The trial court erred by refusing to sanction Plaintiff for filing a duplicative, frivolous suit. Accordingly, this Court should AFFIRM the trial court's dismissal of Grant County Superior Court Cause No. 12-2-00314-5, AFFIRM the trial court's refusal to consolidate the actions, REMAND Respondent's motion for sanctions under CR 11 to the trial court, and sanction Plaintiff/Appellant under RAP 18 for filing a frivolous appeal.

DATED this 2nd day of June, 2015.

Respectfully Submitted,

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