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Division III  
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No. 365174

**COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON**

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ALLAN MARGITAN and GINA MARGITAN, husband and wife,

Appellants,

v.

RISK MANAGEMENT, INC., a Washington corporation and  
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Respondents.

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**BRIEF OF APPELLANTS MARGITAN**

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## **I. INTRODUCTION**

Cliff Walton (hereafter “Mr. Walton”) operates and owns the Respondent Risk Management Inc. (hereafter “RMI”) which sells and markets insurance on behalf of the Respondent Allstate Insurance Company (hereafter “Allstate”).

Mr. Walton, at the time of sale to the Appellants Allan and Gina Margitan, (hereafter “Margitans”) represented that the Allstate Insurance policy he was selling them would provide legal representation if anyone brought a civil claim against them except for business related claims.

In October 2012, the Margitans’ neighbors (Hanna) brought a quiet title civil complaint against the Margitans. The Margitans notified RMI of the complaint and requested coverage. In 2014 the Hannas amended their complaint seeking the removal of the Margitans’ lakeside rental house. Allstate never responded to the requests for coverage, causing the Margitans to defend the litigation themselves.

In a declaration filed by Allstate to support their summary judgment motion, Allstate indicated that they may not have received notice of the lawsuit from RMI.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in failing to find material issues of fact are in dispute regarding the Respondent ALLSTATE’s failure to provide a defense of the 2012 litigation in Breach of the party’s policy.
2. The trial court erred in failing to find material issues of fact are in dispute regarding the Respondent ALLSTATE’s failure to respond to the Margitan’s claim for coverage and defense of the 2012 litigation in Bad faith, pursuant to RCW 48.01.030 and WAC 284-30-330.

3. The trial court erred in failing to find material issues of fact are in dispute regarding the Respondent ALLSTATE duty to defend under the Margitan's policy.
4. The trial court erred in holding that there were no material facts in dispute as to Washington Consumer Protection Act Violation by Allstate Insurance Company and Risk Management Inc.
5. The trial court erred in holding that the Margitan(s) had no damages due to no duty to defend under the Allstate policy.
6. The trial court erred in its Order granting summary judgment to the Respondent RMI, holding that the Margitans could not amend their complaint.

### **III. FACTS**

Cliff Walton (Mr. Walton) operates and owns Risk Management Inc. (RMI) Mr. Walton has been selling insurance to the Margitans for over 17 years (CP 1328 line 14).

Mr. Walton informed the Margitans that the insurance policy he was selling to them would provide legal representation if anyone brought a civil claim against them (CP 1342 line 23 – CP 1343 line 10). Walton stated to Margitans that Allstate would provide legal representation provided it was not an issue involving business or criminal issues (CP 1342 line 23 – CP 1343 line 10 and CP 1088 line 18).

In October 2012, Hannas, Margitans' neighbors, brought a quiet title civil complaint against the Margitans (CP 1051 line 4). Hannas requested the Court to reduce the width of a dedicate 40-foot easement for ingress, egress and utilities the Margitans have to their Parcel 3 of Short Plat 1227 in Spokane County Washington (CP 1054 line 1). Hannas also requested the Court to eliminate two deed easements Margitans purchased in 2002 to access their water front (CP 1053 line 23).

Within days after the Margitans were served the complaint Mr. Margitan notified Mr. Walton to start the claim process of the Allstate policy (CP 30 line 7) & (CP 1052 line 4). Allstate required Margitans to “Promptly notify us or our agent” to either Mr. Walton or Allstate (CP 1068). Margitans complied with the policy requirements and notified Mr. Walton that he requested coverage as Mr. Walton had stated the policy provided (CP 1052 line 4). Late October or early November 2012, Mr. Margitan provided Mr. Walton with a copy of the complaint. Allstate never responded to the Margitans’ 2012 request for coverage (CP 1052 line 17).

Then in July 2014 Hannas amended their complaint and requested the Court to order the Margitans to remove their remodeled home from its location in which it had been in since the 1930s (CP 30 line 12) & (CP 1052 line 10). Again, as required by the Allstate policy in July 2014, Mr. Margitan notified Walton and requested Allstate provide the coverage that Walton told them their policy provided. Again, Allstate never responded to the Margitans’ request for coverage (CP 30 line 14) & (CP 1052 line 10).

In March 1, 2017 Margitan filed a claim directly to Allstate a claim and requested Allstate to provide the coverage that he was sold, or he would bring an action against Allstate (CP 1055 line 15). Allstate denied the claim on March 24, 2017 (CP 1055 line 18).

Shortly after Margitan informed Ms. Hunt that Allstate failed to address the provision of the Allstate policy that Mr. Walton stated provided the legal representation (CP 1055 line 21). Allstate responded that the insurance policy contained such language as Margitan stated (CP 1055 line 22). Mr. Walton and Margitan then provided Ms. Hunt of Allstate with the language of the policy (CP 1055). Again, Allstate denied coverage to Margitan for two reasons first claiming the request for coverage was not timely and second that the policy did not provide the coverage that Mr. Walton stated it provided (CP 1057 line 9).

Margitans then filed a complaint against Allstate and Mr. Walton and his company Risk Management Inc. (CP 1 – 9).

Mr. Walton and RMI argued that since Mr. Walton is classified as an “Insurance producer” he is exempt from complying with the Washington Consumer Protection Act and the Fair Insurance Practices (RCW 48.30). The Court granted Mr. Walton and RMI’s summary judgment. Allstate in a summary judgment requested that the Court determine that the insurance policy did not provide the coverage that Mr. Walton stated the policy provided. Allstate also requested that Court determine that it could not be held responsible for its agent’s statements.

Defendant RMI admitted in their motion for summary judgment that Margitans requested coverage at in November 2012, and in July 2014 (CP 30 line 7 and 14).

Allstate never provided any defense why they failed to comply with the two requests for coverage made in 2012 and 2014. Margitans purchased their Allstate policy from Mr. Walton owner of Risk Management Inc. (RMI) (CP 1375 line 23). Risk Management Inc. is a Washington corporation. RCW 48.17.10 states an “Insurance Producer” is a person. Mr. Walton is a person by definition

#### **IV. STANDARD OF REVIEW**

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). It is well settled law that summary judgment is only proper if the records on file with the trial court show " there is no genuine issue as to any material fact" and " the moving party is entitled to a judgment as a matter of law." CR 56(c). This court, like the trial court, must construe all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The Washington State Legislature has authorized the Insurance Commissioner through RCW 48.30.010 to define methods of competition and acts and practices in the conduct of the business of insurance which are unfair or deceptive. The purpose of WAC 284-30-300 through 284-30-400, is to define certain minimum standards which, if violated with such frequency as to indicate a general business practice, will be deemed to constitute unfair claims settlement practices.

The Washington State Legislators have authorized these regulations to be cited and referenced as unfair claims of settlement practices in Washington State.

## **V. LEGAL ARGUMENT**

In 2012 the Mr. Margitan went to the office of Defendant Mr. Walton of RMI, to report a lawsuit and make a claim. Mr. Margitan followed the procedure set forth in the policy and notified the agent, the Defendant Mr. Walton of RMI.

The Margitans discussed the lawsuit with Mr. Walton, and when Mr. Margitan left the agent's office, he felt he had followed the procedure to file a claim under his policy for the defense of the Hanna litigation (CP 1052 line 4).

In Washington an insurer has a duty to defend " 'when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage. *Unigard Ins. Co. v. Leven*, 97 Wash.App. 417, 425, 983 P.2d 1155 (1999). The Margitans and Allstate's agent both after reviewing the policy had the opinion the Allstate policy provided coverage. Mr. Margitan stated in his declaration (CP 1053):

21. Mr. Walton told Margitan that he believed since Hannas were asking that Margitan's easements be eliminated that eliminating these easements would be considered a loss to Margitans which Allstate would be required to defend against.
22. Mr. Walton also told Margitan that Hannas request to reduce Margitans easement to 20 feet would decrease the property value and would also be considered a loss that Allstate would be required to defend against.

Mr. Walton stated in his deposition (CP1043):

23 Q. Did you ever give Mr. Margitan an example of  
24 the coverage that Allstate extended to your in-laws?  
25 A. Yes

At (CP 1044) Mr. Walton stated:

1 Q. And can you explain what you told Mr. Margitan  
2 regarding that?

3 A. My in-laws had a situation where there was a  
4 partnership with two of his brothers and one brother  
5 was burning slash piles, so wood debris, on acreage  
6 they owned out in the woods and the Washington DNR  
7 responded to the fire and then the State of Washington  
8 pursued my father-in-law and his two brothers for  
9 damages from that. And in that situation, Allstate  
10 employed a lawyer, an attorney, for my father-in-law  
11 to protect him from the State or defend him from the  
12 State; and then they also hired a second attorney, and  
13 my assumption there is that -- to oversee the case  
14 against my father-in-law.

15 Q. And that was used as an example of what kind  
16 of coverage Allstate would cover?

17 A. Of a situation, correct.

At (CP 1347) Mr. Walton stated:

13 Q. When Mr. Margitan discussed the 2012 lawsuit  
14 with you, did you make any indications to him that you  
15 thought that loss would be covered?

16 A. In the later years, yes.

And at (CP 1348) Mr. Walton stated:

7 Q. (BY MR. LOCKWOOD) And later did you and  
8 Mr. Margitan go through his homeowner's policy, looking  
9 at whether or not the coverages would apply to the  
10 2012 lawsuit?

11 A. Yes.

12 Q. And after going through that, the homeowners  
13 policy, with him, did you indicate that you felt that  
14 he would be covered under the policy?

15 A. I felt it was worth submitting the claim so  
16 that we could get a determination.

Our Supreme Court has held that an insurer is not relieved of its duty to defend unless the claim  
alleged in the complaint is "clearly not covered by the policy." *Kirk v. Mt. Airy Ins. Co.*, 134

Wash.2d 558, 561, 951 P.2d 1124 (1998). Additionally, if a complaint is ambiguous, a court will construe it liberally in favor of "triggering the insurer's duty to defend." *R.A. Hanson Co. v. Aetna Ins. Co.*, 26 Wash.App. 290, 295, 612 P.2d 456 (1980).

The duty to defend differs significantly from the duty to indemnify as it "hinges on the insured's actual liability to the claimant and actual coverage under the policy." *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wash.2d 55, 64, 64, 1 P.3d 1167 (2000).

In short, "the duty to defend is triggered if the insurance policy conceivably covers the allegations in the complaint, whereas the duty to indemnify exists only if the policy actually covers the insured's liability". *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454, (2007).

In this case as state above both the insured and Allstate's own agent interpreted the terms of the policy to provide a defense. This clearly fulfills the question of whether or not the insurance policy "conceivably" covers the allegations in the complaint as indicated in the *Woo Id.*, decision.

Further the *Woo Id.*, court went on to say at page 53-54:

¶ 15 "There are two exceptions to the rule that the duty to defend must be determined only from the complaint, and both the exceptions favor the insured." *Truck Ins.*, 147 Wash.2d at 761, 58 P.3d 276. First, if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend. *Id.* Notice pleading rules, which require only a short and plain statement of the claim showing that the pleader is entitled to relief, impose a significant burden on the insurer to determine if there are any facts in the pleadings that could conceivably give rise to a duty to defend. *Hanson*, 26 Wash.App. at 294, 612 P.2d 456. Second, if the allegations in the complaint " ' "conflict with facts known to or readily ascertainable by the insurer," ' " or if " ' "the allegations ... are ambiguous or inadequate," ' " facts outside the complaint may be considered. *Truck Ins.*, 147 Wash.2d at 761, 58 P.3d 276 (quoting *Atl. Mut. Ins. Co. v. Roffe, Inc.*, 73 Wash.App. 858, 862, 872 P.2d 536 (1994) (quoting *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wash.2d 901, 908, 726 P.2d 439 (1986))). The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend--it may do so only to trigger the duty. *Id.* ¶ 16 The duty to defend is a valuable service paid for by the insured and one of the [164 P.3d 460] principal benefits of the liability insurance policy. *Griffin v. Allstate Ins. Co.*, 108 Wash.App. 133, 138, 29 P.3d 777, 36 P.3d 552 (2001); *Safeco Ins. Co. v. Butler*, 118 Wash.2d 383, 392, 823 P.2d 499

(1992); *Tank v. State Farm Fire & Cas. Co.*, 105 Wash.2d 381, 390, 715 P.2d 1133 (1986); *THOMAS V. HARRIS*, WASHINGTON INSURANCE LAW § 11.1, at 11-1, 11-2 (2d ed.2006). If the insurer is uncertain of its duty to defend, it may defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend. *Truck Ins.*, 147 Wash.2d at 761, 58 P.3d 276 (citing *Grange Ins. Co. v. Brosseau*, 113 Wash.2d 91, 93-94, 776 P.2d 123 (1989)). Although the insurer must bear the expense of defending the insured, by doing so under a reservation of rights and seeking a declaratory judgment, the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself from a claim of breach. *Id.*

- 1. The trial court erred in failing to find material issues of fact are in dispute regarding the Respondent ALLSTATE's failure to respond to the Margitan's claim for coverage and defense of the 2012 litigation in Bad faith pursuant to RCW 48.01.030 and WAC 284-30-330.**

The Respondent Allstate failed to respond to the Margitan's request for coverage requested through Allstate's agent Mr. Walton of RMI for defense of the 2012 Hanna litigation.

Recently in *Keodalah v. Allstate Insurance Company*, 3 Wn.App.2d 31, 35-36, 413 P.3d 1059, (2018) the court held that RCW 48.01.030 imposes a duty of good faith on "all persons" involved in insurance, including the insurer and its representatives by stating:

"RCW 48.01.030 imposes a duty of good faith on " all persons" involved in insurance, including the insurer and its representatives. The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance. A person who violates this duty may be liable for the tort of bad faith.[8] RCW 48.01.070 defines " person" as " any individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation.

Further, WAC 284-30-330(2) "Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.", specifically holds that failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies and failing to affirm or deny coverage of claims within a

reasonable time after fully completed proof of loss documentation has been submitted are both unfair methods of competition and unfair or deceptive acts or practices of the insurer.

As in this case a first party bad faith claim arises from the fact that the insurer has a quasi-fiduciary duty to act in good faith toward its insured. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wash.2d 122, 128, 196 P.3d 664 (2008). There are numerous recognized actions for bad faith in Washington including as in this case untimely investigations of coverage, *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wash.2d 784, 793, 16 P.3d 574 (2001).

Respondent RMI is well aware that Margitan's requested coverage when RMI state in their motion for summary judgment at (CP 30 line 7):

In November 2012, Plaintiffs asked Mr. Walton to contact Allstate and request coverage for the costs of defending against the Hannas' quiet tile action."

And when Respondent RMI states in their motion for summary judgment at (CP 30 line 14):

In July 2014, Plaintiffs asked Mr. Walton to contact Allstate and request coverage for the costs related to the amended claim.

Here the evidence at a minimum creates an issue of material fact as to the Respondent RMI's notification to the Respondent Allstate of the Margitan's claim for coverage under their Homeowners policy of the 2012 and 2014 Hanna litigation.

Mr. Walton, in his deposition, acknowledged the conversation with Mr. Margitan and acknowledges no claim file was set up for the Margitans by Defendant Allstate. Mr. Walton, stated at (CP 1345 – CP 1346):

17 Q. When the Margitans told you about the lawsuit  
18 with the neighbor, did they also request that you file  
19 a claim with Allstate?

20 A. I believe the conversation was more around,  
21 "Is this a covered loss?" And my typical process when  
22 an insured comes to me and says, "Cliff, I have a  
23 situations," I would then call a -- well, currently we  
24 call what is called the claims advocate and I would

25 talk to that claims advocate on if the situation was a

1 covered loss and then the claims advocate would give  
2 me one of three answers: would be "Yes," "We don't  
3 have enough information," or "No."

4 And then, depending on the claims adjustor  
5 slash advocate's response, if it was a yes, then we  
6 would open a claim file with Allstate; if it was not  
7 enough information or unknown, then we would open a  
8 claim file; and if it was a no, I would typically then  
9 respond back to the insured, saying that that's not a  
10 covered loss.

11 Q. Do you remember what you told Mr. Margitan  
12 after your inquiry?

13 A. Not specifically.

14 Q. Did you open up a claim file?

15 A. In 2012, we did not.

The Respondent Allstate does not indicate any investigation or communication with the Margitans until Allstate's letter of March 2, 2017 (CP 1170). Melissa Hunt of Allstate states in her declaration at (CP 1170):

The first time Alan and Gina Margitan filed a claim was on February 27, 2017 when a phone call was made to Allstate.

The Respondent Allstate admits that did not make a prior determination on the Hanna 2012 litigation. The Respondent Allstate failed to respond to Margitan's 2012 and 2014 requests for coverage, which is a clear breach of their contract/policy.

Mr. Margitan testified in his declaration that Respondents Allstate failed to respond to his claim, as they never sent him any correspondence, nor did he receive a phone call regarding his claim for a defense to the 2012 and 2014 lawsuit until he threatened to file a lawsuit in 2017 (CP 1052).

Evidence that Respondent Allstate failed to investigate or respond to the first request for coverage of the Hanna litigation claim is Mr. Walton's, testimony that it was not enough to inquire with Allstate again regarding coverage after the Hanna amended complaint was filed (CP 1329).

2 Q. (BY MR. LOCKWOOD) Do you remember the  
3 conversation with Mr. Margitan regarding the amendment  
4 to the 2012 Complaint in which they were requesting  
5 that his rental home be tore down?

6 A. I wouldn't recommend -- or remember  
7 specifically the word "amendment." I do recall  
8 conversations with Mr. Margitan that the other party  
9 had requested that he tear down his house after he had  
10 remodeled it.

11 Q. And did you report that to Allstate?

12 A. The -- I'm going -- I -- The conversation of  
13 them requesting that their house be tore down, I would  
14 not -- well, **I would not say that would be enough for**  
**15 me to inquire again, although I may have.** I do not  
16 recall the specific situation.

Mr. Walton indicated the Respondents Risk Management Inc. (RMI) is a as a captive agent and its effect at (CP 1321) of his deposition by saying:

8 A. We are what's called a captive agency. So, as  
9 a captive agency, Allstate dictates who I have access  
10 to. So, we have some opportunities to broker items  
11 outside of Allstate. Initially, it was very limited  
12 to commercial risks. It's opened up a little bit  
13 lately to personal line risks.

As a captive agent the Respondent RMI under Washington law is the agent for the principle the Respondent Allstate. Our courts have held that an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control. *Moss v. Vadman*. 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970). This results in the Respondent RMI's knowledge dealing with the Margitans as an agent be imputed to the Respondent Allstate, as its principal, due to the discussions being both relevant to the agency and the matters entrusted to the agent. *Roderick Timber Co. v. Willapa Harbor Cedar Products. Inc.*, 29 Wn.App. 311, 316-17, 627 P.2d 1352 (1981).

The Margitan request that the Respondent Allstate be notified of the Hanna amendment of the state court complaint if not actually communicated by Mr. Walton should be imputed. Margitan's complied with Allstate's requirement to initiate a claim which was (CP 1068):

**1. What You Must Do After an Accidental Loss**

In the event of bodily injury or property

Damage, you must do the following:

- a) Promptly notify us or our agent ...

Mr. Walton did indicate he had previously notified the Respondent Allstate and may have notified them a second time (CP 1349 line 14).

Respondent RMI is well aware that Margitan's requested coverage when RMI state in their motion for summary judgment at (CP 30 line 7): "In November 2012, Plaintiffs asked Mr. Walton to contact Allstate and request coverage for the costs of defending against the Hannas' quiet tile action." And also, when Defendant RMI state in their motion for summary judgment at (CP 30 line 14): "In July 2014, Plaintiffs asked Mr. Walton to contact Allstate and request coverage for the costs related to the amended claim.

The Respondent Allstate failed to respond to the first and second notifications by their agent, Respondent RMI. These failures to respond to the Margitans request for coverage create material facts in dispute as the issue of "Bad Faith" under either or RCW 48.01.030 and WAC 284-30-330.

- 2. The trial court erred in failing to find material issues of fact are in dispute regarding the Respondent RISK MANAGERMENTS failure to notify the Respondent ALLSTATE of the Margitan's claim for coverage and defense of the amended 2012 litigation in Bad faith pursuant to RCW 48.01.030.**

Respondent RMI confirmed that Margitans requested coverage in November 2102 when they state in their motion for summary judgment at (CP 30 line 7): "In November 2012, Plaintiffs asked Mr. Walton to contact Allstate and request coverage for the costs of defending against the Hannas' quiet tile action."

There is evidence of causation when the Respondent RMI confirmed in their motion for summary judgment at (CP 30 line 7):

In November 2012, Plaintiffs asked Mr. Walton to contact Allstate and request coverage for the costs of defending against the Hannas' quiet title action.

And when the Respondent RMI states in their motion for summary judgment at (CP 30 line 14):

In July 2014, Plaintiffs asked Mr. Walton to contact Allstate and request coverage for the costs related to the amended claim.

Material facts are in dispute as to the Respondent RMI failing to notify the Respondent ALLSTATE of the Margitan request for coverage. As indicated above Melissa Hunt of Allstate indicated in her declaration that the first time Alan and Gina Margitan filed a claim was on February 27, 2017 when a phone call was made to Allstate (CP 1170). If the Respondent ALLSTATE first received notice of the Margitan request for coverage on February 27, 2017 the Respondent RMI was acting in bad faith for its failure to promptly notify Allstate.

RCW 48.01.030 imposes a duty of good faith on "all persons" involved in insurance, including the insurer and its representatives. There are material issues of fact in dispute as to the Respondent RMI allowing the Margitans to believe a request for coverage had been made to Allstate in 2012 and 2014 (CP 1052).

RCW 48.01.030 also requires the Respondent RMI to abstain from deception, and practice honesty and equity in all insurance matters. Here the Margitans were deceived by the Respondent RMI's act of allowing the Margitan's to go several years without a coverage determination, knowing Allstate had no notification.

This is an issue of bad faith which should go to the jury to make a determination based on the disputed facts.

**3. The trial court erred in failing to find material issues of fact are in dispute regarding the Respondent ALLSTATE duty to defend under the Margitan's policy.**

In this case the Allstate's representative Mr. Walton testified that the Allstate policy he sold required Allstate to defend Margitans (CP 1347 line 13). Even though Mr. Walton agrees with Margitans claim that the policy required Allstate to defend the Court found that Allstate had no duty to defend.

All parties agreed that when Mr. Walton solicited Margitans to buy the Allstate homeowners and landlord policies Mr. Walton informed the Margitans that the policy would cover legal defense if anyone brought a suit against Margitans (CP 1342 line 23 – CP 1343 line 10). Mr. Walton was referring to the "Additional Protection" in the "Family Liability and Guest Medical Protection" which states (CP 1087):

**Additional Protection**

**We will pay, in addition to the limits of liability:**

**1. Claim Expense We will pay:**

**a) all cost we incur in the settlement of any claim or the defense of any suit against an insured person;**

The "Additional Protection" section is a standalone section of extra coverage outside of section "X" and Section "Y" the wording is clear it is much like an umbrella policy.

The Court erred when it determined that the policy did not provide coverage as Mr. Walton stated it did. Mr. Walton is trained by Allstate to sell their policies (CP 1330 line 8).

Mr. Walton admitted even after the Margitans filed their lawsuit that he understood the policy to read that Allstate should be required to provide legal defense for Margitan (CP 1322 line 23 – CP 1323 line 10 and CP 1088 line 18).

The Washington Supreme Court found in *Morgan v. Prudential Ins. Co.*, 86 Wn.2d 432, 435, 545 P.2d 1193 (1976) that when a clause in an insurance policy is ambiguous, it will be construed

in a manner most favorable to the insured regardless of the insurer's intention. In this present case Mr. Walton, a 17-year representative of Allstate testified that he sold the policy with the intention that the policy provided defense for Margitans.

The Washington State Supreme Court found in *Shotwell v. Transamerica Title Ins. Co.*, 91 Wn.2d 161, 168, 588 P.2d 208 (1978) the language in an insurance contract must be interpreted as it would be understood by an average person purchasing insurance, and not in a technical sense.

The Washington State Supreme Court in *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983) held that the court will interpret an insurance contract according to the way it would be understood by the average insurance purchaser. Mr. Walton is more than an average insurance purchaser, he has over 17 years of selling Allstate policies (CP 1328 line 14). Mr. Walton is trained by Allstate is a professional and he understands that the Allstate policy would provide defense for Margitans (CP 1322 line 23 – CP 1323 line 10 and CP 1088 line 18).

In *Pierce v. Aetna Cas. Sur. Co.*, 29 Wn. App. 32, 36, 627 P.2d 152 (1981) the court is to construe an inclusionary clause liberally to provide coverage whenever possible. If a policy provision is ambiguous, the court must apply the meaning and construction most favorable to the insured, even though the insurer may have intended another meaning. *Herrmann v. Grange Ins. Ass'n*, 33 Wn. App. 734, 736, 657 P.2d 346 (1983) In this case, Mr. Walton the insurers representative testified that he intended to sell Margitans the Allstate policy which he stated had the duty to defend.

In *Crunk v. State Farm* 38 Wn. App. 501 (Wash. Ct. App. 1984) the Court decided that the insurance company had the best position to make the policy clear, quoting Munchick, 209 N.E.2d

at 169-70. Here Allstate wrote the policy and had the option to write the policy any way they wished before it was marketed to Margitans.

Mr. Walton is not an average person, he is trained by Allstate, and has been selling insurance for Allstate over 17 years. Mr. Walton testified that not only did he sell the policy claiming it would defend but he understood the language of the policy provided it (CP 1342 line 23 – CP 1343 line 10 and CP 1088 line 18).

In 2012 when Hannas brought suit against Margitans they placed Margitans in a position to be liable to Hannas. The policy states that it provided additional protection if a suit was brought against the insured. Mr. Walton confirms that he understands and sold the policy with the understanding that if suit like Hannas would be brought against Margitans Allstate would be required to defend Margitans.

The general rule is that insurers who have reserved the right and duty to defend are obliged to defend any suit which alleges facts wherein, if proven, would render the insurer liable. *Seaboard Sur. Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 81 Wn.2d 740, 504 P.2d 1139 (1973).

The Washington Supreme Court in *Pacific Power & Light Co. v. White*, 96 Wash. 18164 Pac. 602 (1917) quoting Bouvier defines "liability" as "responsibility; the state of one who is bound in law and justice to do something which may be enforced by action."

Black's Law Dictionary 5<sup>th</sup> Edition defines liability as:

The word is a broad legal term. *Mayfield v. First Nat. Bank of Chattanooga, Tenn.*, C.C.A. Tenn., 137 F. 2 1013, 1019. It has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely. It has been defined to mean: all character of debts and obligation, *Public Market Co. of Portland*, 171 Or. 522, 130, P.2d 624, 643, 646. ...

Hanna's 2012 complaint requested that the court reduce Margitan's easement from 40 feet to 20 feet. Hanna's 2013 amended complaint requested the Court to find that the home Margitan's remodeled which was originally built somewhere in the 1930s prior to Margitans ownership in violation of the law and be removed. The Washington Supreme Court address issue of whether a property owner or leaser is liable for past actions in *Pope Resources, LP v. Wash. Dept. of Natural Resources*, No. 94084-3 (Wash. May 24, 2018) even though Pope was a Model Toxics Control Act issue it still represents when a party can become liable for past actions.

If Hannas prevailed on the issue to reduce the easement width to 20 feet, Margitan would be become liable to Hannas to remove their utilities from the 40-foot easement once the Court ordered it reduced 20-foot easement. If Hannas prevailed on their amended complaint requiring Margitans to remove their home from its location Margitans would have become liable to Hannas to remove their home from its location of where it had been located since the 1930s.

Mr. Walton, Allstate's representative testified that the "Family Liability" section of the Additional Protection section would provide a legal defense for Margitans. If Hannas 2012 and 2014 complaint was not defended Margitans would have became liable to Hannas. The Allstate policy was sold to Margitans for this very type of coverage. The Allstate policy required Allstate to defend Margitans.

The Court erred when it took the side insurance company over the testimony of the trained insurance representative.

- 4. The trial court erred in failing to find material issues of fact are in dispute as to Washington Consumer Protection Act violations by Respondents, ALLSTATE and RMI.**

The Margitans allege that the Respondent Allstate acted in bad faith by failed to respond timely to request for coverage to Hanna complaint and failed provide a defense to Hanna state court litigation in violation of RCW 48.01.030.

The Margitans further allege that the Respondent RMI acted in bad faith by failing to notify Allstate of the Hanna Litigation in 2012 and 2014 in violation of RCW 48.01.030.

Allstate argued, and the trial court agreed, that the Margitan's insurance policy did not provide coverage for a legal defense for the claims filed against Plaintiffs, irrespective of Mr. Walton's representations (CP 142 – 172).

However, Washington case law holds that independent of whether an insurer must provide coverage, an insured may bring a claim for violation of the CPA and bad faith. *Coventry Associates v. American States Ins. Co.*, 136 Wash.2d 269, 279, 961 P.2d 933 (1998) The courts have held that an insurer's duty of good faith is separate from its duty to indemnify if coverage exists. *Anderson v. State Farm Mutual Ins. Co.*, 101 Wash.App. 323, 329, 2 P.3d 1029 (2000) The determinative question is reasonableness of the insurer's actions in light of all the facts and circumstances of the case. *Anderson Id.* at 329-330. In *Security State Bank v. Burk.* 100 Wn.App. 94, 101-02, 995 P.2d 1272 (2000), the court held that reasonableness is a question of fact to be determined by the tier of fact. A jury must determine if it was reasonable for the Respondent Allstate to deny a defense in the state court claims by Hanna. A jury must determine if it was reasonable for the Respondent Allstate to fail to respond to a request for coverage or to cover costs of a defense. These are material facts at issue that should be determined by the tier of fact and not on summary judgment.

The Washington Consumer Protection act, (“WCPA”) provides that "unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful. The WCPA prohibition against unfair trade practices may be enforced by private citizens. (RCW 19.86.090. RCW 19.86.020 The

WCPA serves broadly to prohibit "unfair or deceptive acts or practices in trade or commerce." by providing individuals and entities with a private right of action if they have sustained injury. (RCW 19.86.020)

The Margitans have alleged a violation of the WCPA by claiming the Respondent Allstate failure to timely respond a request for coverage and their failure to defend violated RCW 48.30.010 and WAC 284-30-330 in essence a per se violation. It is well established that "only an insured may bring a per se action" for violations of the CPA. *Tank v. State Farms*. 105 Wn.2d 381, 394, 715 P.2d 1133 (1986).

The Washington Legislature enacted RCW 48.30.010(7) that provides that unfair or deceptive acts in the business of insurance are actionable under the CPA, and specifically provides that it is an unfair or deceptive act to a first party claimant.

In light of our Washington courts having held that a single violation of WAC 284-30-330 can in its self, support a consumer protection violation claim. In *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 920-925, 792 P.2d 520, 528-530 (1990) the held that:

In the present case, the Kallevigs argue that a first party insured may bring an action for violation of the CPA based upon a violation of RCW 48.30.010(1) resulting from a single violation of WAC 284-30-330. We agree.

In *Shah v. Allstate Ins. Co.*, 130 Wn.App. 74, 121 P.3d 1204, (2005) the court listed the elements applicable to WCPA claims by an insured at pages 86:

¶ 23 The five elements required to establish a violation of the CPA are: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986).

It is well settled law that an insurer commits a per se violation of the WCPA when the insurer violates a statute that contains a specific legislative declaration of public interest impact. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 791, 719 P.2d 531 (1986)

A violation of WAC 284-30-330(7) is a per se violation of the WCPA as the provisions within WAC 284-30-330 are unfair or deceptive acts or practices in the business of insurance and pursuant to RCW 48.01.030 the business of insurance is one affected by the public interest. *Hangman Ridge*, Id at 786.

The Margitans had provided evidence of all five necessary elements which created material facts being in dispute. The Court erred for granting Defendant's Summary Judgment request with such material facts in dispute.

**i. unfair or deceptive act or practice**

The Plaintiffs have alleged violations of WAC 284-30-330, which state specific acts which are deemed an unfair, deceptive act or practice by insurance providers in relevant part WAC 284-30-330(9-13) states:

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:

- (1) Misrepresenting pertinent facts or insurance policy provisions.
- (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
- (3) Failing to affirm or deny coverage of claims within a reasonable time after fully completed proof of loss documentation has been submitted.
- (4) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to promptly pay property damage claims to innocent third parties in clear liability situations. If two or more insurers share liability, they should arrange to make appropriate payment, leaving to themselves the burden of apportioning liability.
- (5) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by

offering substantially less than the amounts ultimately recovered in such actions or proceedings.

As indicated above neither Respondents disputes the policy misrepresentations of the Respondent Allstate agent's Mr. Walton. Mr. Margitan testified they requested coverage in late 2012 and July 2014 (CP 1052 line 4 – 13). Additionally, Mr. Walton of RMI clearly indicated he would "... inquire again, although I may have." (CP 1349 line 15).

The material facts in dispute question whether or not Mr. Walton notified Allstate of the 2012 and 2014 request for coverage. (CP 1170 line 8) This is in light of Mr. Walton's statement that he would "inquire again" which confirms that he had made a prior inquirer for coverage for Margitans to Allstate (CP 1349 line 15).

Defendant RMI confirm that Margitans requested coverage in November 2102 in their motion for summary judgment at (CP 30 line 7).

Additionally, in RMI's motion for summary judgment at (CP 30 line 7).

"In November 2012, Plaintiffs asked Mr. Walton to contact Allstate and request coverage for the costs of defending against the Hannas' quiet tile action."

The Defendant RMI also states in their motion for summary judgment at (CP 30 line 14):

"In July 2014, Plaintiffs asked Mr. Walton to contact Allstate and request coverage for the costs related to the amended claim.

The Appellant Mr. Margitan provided evidence of causation of injuries in his declaration in which he states (CP 1054):

27. In late 2012, when I informed Mr. Walton my neighbors brought a lawsuit against us he told me I that I had a duty to reduce the costs to Allstate by assisting my legal counsel. Mr. Walton told me to keep track of my time since Allstate would be required to compensate me for my assistance.

Allstate confirmed the Margitan's request for coverage of damages when Melissa Hunt state in her declaration at (CP 1170 line 3):

The March 24, 2017 letter also addressed the request for payment of fees and costs that the Plaintiffs incurred in defending a Quiet Title action brought by Mark and Jennifer Hanna.

Mellissa Hunt of Allstate confirms that Allstate never replied to the Margitan request for coverage until March 24, 2017 (CP 1169).

Viewing the facts in a light most favorably to the Margitans (non-moving party)

the Respondent Allstate clearly engaged in unfair, deceptive acts or a practice by violation of the provisions set forth in WAC 284-30-330.

Further, the Respondent RMI violated WAC 284-30-330(1) by “Misrepresenting pertinent facts or insurance policy provisions” by indicating coverage extended to any lawsuit other than criminal or business lawsuits. (CP 1342 line 23 – CP 1343 line 10).

On March 24, 2017, Ms. Hunt the Adjuster of Allstate violated WAC 284-30-330. Ms. Hunt misrepresented Margitans policy provisions when she stated that the policy had no such section as “Additional Protection”. This is an act of Bad Faith on its own. To deny coverage when not reviewing the complete policy is an act of Bad Faith (CP 1055 line 20).

**ii. occurring in trade or commerce**

The Respondent Allstate’s agent Mr. Walton sold Allstate policies to the public for 17 years having opened his own office in 1999 which was a “captive agency” for Allstate (CP 1331).

Mr. Margitan indicated that he has been an insured by the Respondent Allstate for 30 years (CP1046). The Margitans have used the Respondent RMI since 2001 as the agent for Allstate (CP1330).

The court in *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 794, 799-800, 363 P.3d 587, (2015) held:

[¶9] The statutory provisions of the CPA are broadly worded. The statute provides that " [ a ] ny person" can sue for a violation. RCW 19.86.090 (emphasis added). "

Commerce" includes " any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2) (emphasis added). The legislature directed that the CPA " shall be liberally construed that its beneficial purposes may be served." RCW 19.86.920 (emphasis added). The language of the CPA evinces a broad, rather than narrow, lens through which we interpret the statute. [¶10] We first focus on the definition of " commerce" --" any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2) (emphasis added). The definition of " commerce" does not describe who may sue under the CPA but rather the scope of the acts and practices the CPA is designed to prevent.

The facts and evidence clearly indicate both Respondents were engaged in trade and commerce.

**iii. public interest impact**

In Shah supra the Court stated at pages 86-87:

The public interest prong may be satisfied per se, if there is "a showing that a statute has been violated which contains a specific legislative declaration of public interest impact." Hangman Ridge, 105 Wash.2d at 791, 719 P.2d 531. Title 48 of the RCW is the insurance code. RCW 48.01.010. RCW 48.01.030 states that: The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

There is no dispute that Mr. Walton informed Plaintiffs that his policy would provide legal defense except for criminal and business litigation (CP 1342 line 23 – CP 1343 line 10). Mr. Walton also believed Allstate would cover Margitan's request for coverage (CP 1347 line 16).

The Shah Court, supra found that when the Allstate agent misrepresented the policy to Shahs it was a violation of RCW 48.30.090 which affected the public interest.

The Shah court held at page 87:

Thus, whether Ljunggren violated RCW 48.30.090 by making a is representation about the Shahs' coverage is a matter of public interest. The dismissal of the Shahs' CPA claims on summary judgment was error.

**iv. injury to plaintiff in his or her business or property;**

The fourth element has been satisfied by the Margitans incurring significant costs to defend the civil litigation. Further, the representations of Mr. Walton of RMI were relied upon and prevented the Margitans from seeking coverage from a different carrier. Plaintiffs have been injured by Mr. Walton's misleading statements and failure to request coverage from Allstate as he led the Margitans to believe (CP 1152 line 4 - 13).

Due to the Respondent Allstate's failure to timely make a coverage decision the Margitan defended the Hanna litigation in anticipation of coverage in a manner which may have been different had coverage existed (CP 143 line 6).

Due to the Respondent RMI's description of non-coverage being only business or criminal litigation the Margitans were induced not to seek coverage from other agencies.

Most recently in *Gosney v. Fireman's Fund Insurance Co.*, \_\_\_ Wn.App \_\_\_, 419 P.3d 447, 470 (2018)

[¶ 84] Our Supreme Court previously rejected an argument similar to the one now pressed by Fireman's. See *Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 923-24, 792 P.2d 520 (1990). In that case, Industrial Indemnity argued that the trial court erred by instructing the jury that a single violation of WAC 284-30-330 constitutes an unfair trade practice. *Kallevig*, 114 Wn.2d at 921, 792 P.2d 520. Our Supreme Court disagreed. **A violation of WAC 284-30-330 constitutes a violation of RCW 48.30.010(1), which in turn constitutes a per se unfair trade practice .... This per se unfair trade practice may result in CPA liability if the remaining elements of the 5-part test for a CPA action under RCW are established. .... The language of RCW 48.30.010 is plain and unambiguous. RCW 48.30.010 does not contain the frequency requirement set forth in WAC 284-30-300. RCW 48.30.010 prohibits insurers from engaging in any unfair trade practice. In other words, under RCW 48.30.010, a single violation of WAC 284-30-330 constitutes a statutorily proscribed unfair trade practice.** Accordingly, an insured may establish a per se unfair trade practice under the CPA by demonstrating a violation of RCW 48.30.010 based upon a single violation of WAC 284-30-330.

**v. causation**

The Appellant Mr. Margitan provided evidence of causation of damages in his declaration in which he states (CP 1054):

27. In late 2012, when I informed Mr. Walton my neighbors brought a lawsuit against us he told me I that I had a duty to reduce the costs to Allstate by assisting my legal counsel. Mr. Walton told me to keep track of my time since Allstate would be required to compensate me for my assistance.

Additionally, in adjuster Melissa Hunt's declaration at (CP 1170 line 3):

The March 24, 2017 letter also addressed the request for payment of fees and costs that the Plaintiffs incurred in defending a Quiet Title action brought by Mark and Jennifer Hanna.

It is well settled law that an affidavit of the nonmovant must be taken as true for purposes of summary judgment. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 245-46, 943 P.2d 1358 (1997). Based upon Washington case law and the facts of this case the court should find that material facts are in dispute as to WCPA violations of the Respondents.

**5. The trial court erred in holding that the Margitan(s) had no damages due to no duty to defend under the Allstate policy**

Margitan and RMI admit that Margitan filed requested coverage in 2012 and 2014 (CP 30 line 7 – 14) (CP 1052). The trial Court erred when it took it upon its self to dismiss Allstate of any damages Margitan may have occurred. (CP 1200 – 1201).

In *Coventry*, supra at 279, the issue of damages in the context of dismissing an insurance company when it failed to properly investigate was addressed. In *Coventry* the Court addressed dismissing an insurance company when it stated:

Furthermore, an insurer is not liable for the policy benefits but, instead, liable for the consequential damages to the insured as a result of the insurer's breach of its contractual and statutory obligations.

We hold Coventry is not entitled to coverage by estoppel or a return of a portion of its premium but that its damages are limited to the amounts it has incurred as a result of the bad faith investigation, as well as general tort damages.

American States violated its duty of good faith and fair dealing in investigating Coventry's claim. Although coverage was eventually shown to be excluded under the policy, American States still breached its contract with Coventry by acting in bad faith and, thus, harming Coventry. As such, Coventry is entitled to bring actions for bad faith and violation of the CPA. Coventry is not entitled, however, to coverage by estoppel or return of a portion of the premium paid. Rather, Coventry's damages should be limited to its expenses as a result of American States' bad faith acts and ensuing tort and CPA damages.

The trial court erred when it failed to allow Margitan to proceed to trial and allow them to present their damages due to Allstate's violation of its duty to timely investigate and/or defend under its policy irrespective of its obligation to indemnify.

**6. The court erred in its Order granting summary judgment to the Respondent RMI holding that the Margitans could not amend their complaint.**

In support of the Allstate summary judgment motion, Allstate filed a declaration from their adjuster Ms. Hunt on October 1, 2018 (CP1169 - 1180). Her declaration indicates that Allstate did not receive notification of the 2012 and 2014 Margitan requests for coverage (CP 1170 line 8).

On October 1, 2018 the Margitans learned for the first time that RMI did not notify Allstate of the requests for coverage. Our Courts have extended the application of the discovery rule to include claims in which plaintiffs could not immediately know of the cause of their injuries. *North Coast Enterprises, Inc. v. Factoria Partnership*, 94 Wn.App. 855, 974 P.2d 1257, (1999). Here, RMI led the Margitans to believe claims had been filed (CP 1152 line 5 - 13). When Allstate filed Ms. Hunts declaration it became known that RMI did not notify Allstate of the 2012 and 2014 requests for coverage by the Margitans. The failure of RMI to notify Allstate is based in negligence.

The three-year statute of limitation under RCW 4.16.080 for negligence had run at the time of the Margitans learning of RMI's negligence. However, the discovery rule would allow for the filing of a negligence action.

The RNI summary Order preventing an amendment to the Margitan's complaint is in error and as such this appeal should be remanded back to the trial court to allow for an amendment of the Margitan's complaint alleging negligence pursuant to Washington's discovery rule.

## **VI. CONCLUSION**

Washington State Legislators have written the law very clear that no misrepresentation, misleading, unfair or deceptive actions can take place within the insurance industry. Either the policy provides coverage as Mr. Walton represented, or his actions were violations of the Consumer Protection Act.

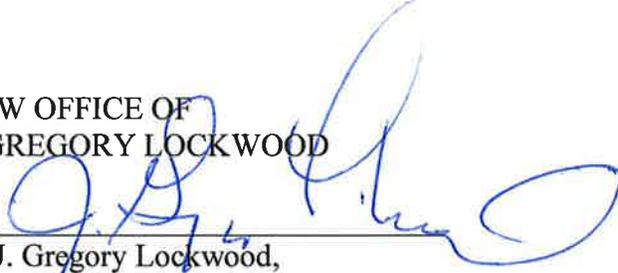
If the policy coverage is as the Court ruled, then Mr. Walton's representation of coverage was misleading to the Plaintiffs. Mr. Walton never disputes that he sold a policy that provided legal defense as Plaintiffs allege. Reversal of summary judgment is appropriate based solely on the Consumer Protection Act.

Allstate's argument was misplaced, as the initial issue is Allstate failure to timely determine coverage on the 2012 and 2014 requests by the Margitans. Allstate appears to hide behind the negligence of their own agent. The trial court failed to address the Bad Faith actions of Allstate based on their failure to respond to coverage requests.

Lastly, this appeal should be remanded back to the trial court to allow for an amendment of the Margitan's complaint alleging negligence by RMI pursuant to Washington's discovery rule.

Dated this, 5 day of April 2019.

LAW OFFICE OF  
J. GREGORY LOCKWOOD

By   
J. Gregory Lockwood,  
WSBA #20629  
Attorney for Appellant

CERTIFICATE OF SERVICE

I, VICKIE FULTON, do declare that on April 5, 2019, I caused to be served a true and correct copy of the foregoing to the following listed party(s) via the means indicated:

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DATED April 5, 2019.

  
Vickie Fulton

**LAW OFFICE OF J. GREGORY LOCKWOOD PLLC**

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