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Division III
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NO. 365174

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ALAN MARGITAN AND GINA MARGITAN, husband and wife,

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENT ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities.....	ii
A. INTRODUCTION	1
B. RESTATEMENT OF ASSIGNMENTS OF ERROR.....	3
(1) Assignments of Error.....	3
(2) Issues Pertaining to the Assignments of Error	4
C. RESTATEMENT OF THE CASE	5
D. SUMMARY OF ARGUMENT	18
E. ARGUMENT	22
(1) Standard of Review	22
(2) Allstate Correctly Determined That There Was No Duty to Defend or Indemnify and the Breach of Contract Claim Fails	22
(3) No Damages Were Established for the Bad Faith and CPA Claims	31
(4) No Issues of Material Fact Exist.	34
(5) Appellants’ Brief Proposes New Theories of the Case That Were Not Argued Before the Entry of the Order For Summary Judgment	38
F. CONCLUSION.....	39

TABLE OF AUTHORITIES

Table of Cases

Washington Cases:

<i>Am. Mfrs. Mut. Ins. v. Osborn</i> , 104 Wn. App. 686, 17 P.3d 1229 (2001)	2, 32
<i>Baldwin v. Silver</i> , 165 Wn. App. 463, 269 P.3d 284 (2011)	37
<i>Coventry Associates v. American States Ins. Co.</i> , 136 Wn.2d 269, 961 P.2d 933 (1998)	2, 20
<i>Expedia, Inc. v. Steadfast Ins. Co.</i> , 180 Wn.2d 793, 329 P.3d 59 (2014)	19, 23
<i>Holly Mountain Resources v. Westport Ins. Corp.</i> , 130 Wn.App. 635, 104 P.3d 725 (2005)	23
<i>In re Marriage of Schwarz</i> , 192 Wn. App. 180, 368 P.3d 173 (2016)	37
<i>Int'l Raceway, Inc. v. JDFJ Corp.</i> , 97 Wn. App. 1, 7, 970 P.2d 343 (1999)	39
<i>Mayer v. Pierce County Med. Bureau, Inc.</i> , 80 Wn. App. 416, 909 P.2d 1323 (1995)	30
<i>McDonald v. State Farm Fire & Casualty Co.</i> , 119 Wn.2d 724, 837 P.2d 1000 (1992)	18
<i>Truck Ins. Exch. v. Vanport Homes, Inc.</i> , 147 Wn.2d 751, 58 P.3d 276 (2002)	23

Washington Pub. Util. Districts' Utilities Sys. v. Pub. Util. Dist. No. 1 of Clallam County,
112 Wn.2d 1, 771 P.2d 701 (1989) 30

Wilcox v. Lexington Eye Institute,
130 Wn. App. 234, 122 P.3d 729 (2005) 38

Out of State Cases:

Kazi v. State Farm Fire & Casualty Co.,
24 Cal. 4th 871, 15 P.3d 223 (2001) 25

Federal Cases:

Nesbitt v. Progressive Northwestern Ins. Co.,
2012 U.S. Dist. LEXIS 155502, 2012 WL 5351846,
(W.D. Wash. Oct. 29, 2012)..... *passim*

Nigro v. Sears, Roebuck & Co.,
784 F.3d 495 (9th Cir. 2015)..... 36

Statutes:

RCW 48.18.140 1, 20

RCW 48.18.190 1, 20

A. INTRODUCTION

Respondent Allstate Property and Casualty Insurance Company (“Allstate”) prevailed in the trial court on a summary judgment motion regarding coverage for a quiet title lawsuit involving easement issues. Alan and Gina Margitan (“Appellants” or “Margitans”) were insured under an Allstate homeowners and personal umbrella policy.

There was no basis for coverage under the Allstate policies. There was no “occurrence” or “property damage” as defined under the policies. The Margitans argued that there is coverage under the “Additional Protection” section of the Allstate Homeowners Policy. This section does not apply when there is no coverage under the policy. The trial court correctly determined that there was no duty to defend or indemnify under the policies.

The Margitans argued that the Allstate agent represented that the Allstate policy would provide payment for legal representation if anyone brought a civil claim against them except for business related claims or if a claim was fraudulent. RCW 48.18.140 and 48.18.190 provide that insurance contracts must be in writing and include the entirety of the policy. The

trial court was correct in finding that the agent's representations did not enlarge the coverage provided by the Allstate policies.

Alan Margitan's Declaration that was submitted in response to the motion for summary judgment dated September 21, 2017 is deficient as there is no allegation of any harm alleged to support an action for Bad Faith or the Consumer Protection Act. In *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 277, 961 P.2d 933 (1998) the court stated that to succeed on a claim of bad faith, an insured must show that he was harmed by the insurer's bad faith conduct. To succeed on a CPA claim, a plaintiff must show resulting injury to the claimant's business or property. *Am. Mfrs. Mut. Ins. v. Osborn*, 104 Wn. App. 686, 697, 17 P.3d 1229 (2001). The trial court was correct in finding that the Declaration of Alan Margitan did not allege harm or injury sufficient to establish an issue of fact for the extra-contractual claims.

The Margitans allege that they tendered the 2012 and 2014 quiet title actions to their insurance agent Clifford Walton and that Allstate was notified of these lawsuits. The deposition testimony of Clifford Walton does not establish that he submitted a claim to Allstate prior to February of 2017. The Declaration of Melissa Hunt states that Allstate was first

informed of the tender of the quiet title litigation in a phone call on February 27, 2017.

Allstate acted reasonably in all respects and the Bad Faith and Consumer Protection Act claims were properly dismissed. The opinion in *Nesbitt v. Progressive Northwestern Ins. Co.*, 2012 U.S. Dist. LEXIS 155502, 2012 WL 5351846, (W.D. Wash. Oct. 29, 2012) by Judge Robert Lasnik held that failure to communicate in a timely manner absent an injury is not a Bad Faith or CPA claim. The failure to prove any damages for the CPA and Bad Faith claims defeats the Margitans' attempt to create an issue of fact.

Appellants present no basis for this Court to overturn the trial court's decision granting summary judgment in favor of Allstate.

B. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Allstate acknowledges Appellants' assignments of error, but believes that the assignments of error could be more appropriately formulated as follows:

(1) Assignments of Error

1. Did the trial court correctly enter the order of summary judgment determining that Allstate had no duty to

defend or indemnify under the policies and dismiss the breach of contract claims?

2. Did the trial court correctly dismiss on summary judgment all extra-contractual claims based on insurance bad faith and CPA claims?

(2) Issues Pertaining to Assignments of Error

Allstate acknowledges Appellants' issues pertaining to assignments of error, but designates the following issues for consideration:

1. Did the trial court properly determine that Allstate had no duty to defend or indemnify under the policies?

2. Did the trial court properly dismiss the extra-contractual claims based on insurance bad faith and CPA claims?

3. Did the trial court properly determine that the Declaration of Alan Margitan submitted in response to the motion for summary judgment was insufficient to create and issue of fact and failed to establish a cause of action for insurance bad faith and CPA claims?

4. Did the Margitans fail to argue that there was coverage or a duty to defend under the written terms of the Allstate Policy in their Response Brief to Allstate's Motion for

Summary Judgment and thereby fail to preserve this issue for appeal?

5. Did the Margitans fail to argue that the “Additional Protection” clause in their Response Brief to Allstate’s Motion for Summary Judgment of the Allstate policies as a basis for the duty to defend and thereby fail to preserve this issue for appeal?

C. RESTATEMENT OF THE CASE

1. **Coverage under the Allstate Policies.**

This case involves a coverage dispute under a Homeowners and Personal Umbrella policy issued by Allstate. The Margitans filed their Complaint on November 28, 2017. CP 3. Claims were filed for breach of contract, violation of the Consumer Protection Act, and insurance Bad Faith under RCW 48.01.050. CP 4-9. There was no IFCA claim pleaded in the Complaint.

Allstate issued a Homeowners Policy and Personal Umbrella Policy to Allen and Gina Margitan. CP 174. The underlying case involved a Quiet Title action filed in 2012 with an amended complaint filed in 2014 captioned *Mark Hanna, et. ux. v. Allan Margitan, et. ux.*, Spokane County Superior Court Case No. 12-2-04045-6. CP 173.

The trial court determined that there is no duty to defend the lawsuit because there was no “occurrence” under the

policies, and no defined “bodily injury” or “property damage” under the Homeowners Policy, or “bodily injury”, “property damage”, or “personal injury” under the Umbrella policy asserted in the lawsuit. CP 1200-1201, TR 45. The Margitans’ Complaint in Count 1 only pleaded breach of contract for the failure of Allstate to defend – there was no claim that there was indemnity coverage under the policy. CP 4-6.

The Margitans argued in their response to the summary motion that Clifford Walton, an Allstate agent, misrepresented the “Additional Protection” provision of the Homeowners and Personal Umbrella Policy would provide coverage for their legal fees. CP 1022. This issue was not properly reserved for review as the Margitans did not include any legal argument on the “Additional Protection” provision in their Response brief (wrongly titled “Reply Brief) to the Summary Judgment Motion. CP 1021 – 1043. The trial court correctly determined that this provision of the policy was only applicable when there was coverage under the policy. CP 1200-1201, TR 44-45.

The Margitans did not argue that there was coverage or a duty to defend under the Allstate Policies in the Response Brief to the summary judgment motion. CP 1021 – 1043. They relied solely upon the agent’s representations. Their claim for breach

of contract based on the language of the policies was not properly preserved for review.

2. Purported Tender of the Quiet Title Litigation.

The Margitans contend that they tendered the 2012 and 2014 quiet title actions to their insurance agent Clifford Walton and that Allstate was thereby notified of these lawsuits. CP 1023-1024. There is a failure of proof regarding whether the Margitans tendered the Quiet Title Complaints to Allstate. What is unique about this case is that there are no letters, emails, or any other documents possessed by the Margitans that show that they made a tender of the underlying lawsuit. Similarly, the insurance agent Clifford Walton has no letters, emails, or other records that show he forwarded this case in writing or via email or any other means to Allstate in 2012 or 2014.

The testimony of the agent, Clifford Walton, is that he believes he may have called an agent telephone line but did not submit a claim to Allstate until 2017. Clifford Walton states that he did not open up a claim file for submittal to Allstate for the 2012 Quiet Title Complaint, as shown below:

Q. Did you open up a claim file?

A. In 2012, we did not

CP 111, (Deposition of Clifford Walton, Pg. 23, Lines 14-15). Clifford Walton states that Plaintiffs did not submit a claim to Allstate for the Amended Complaint (2014) to Quiet Title until 2017, as shown below:

Q. Do you remember if Mr. Margitan brought in the Amended Complaint where they added the teardown of this rental property? Did he bring that in to you, as well?

A. In 2017, yes.

Q. In 2017?

A. Yeah, when we submitted the file, uh-huh. Yes, because we submitted that on to Allstate for him.

Q. So, any conversations that you may have had with Mr. Margitan prior to that, regarding that Amended Complaint, would have just been oral with him and with no documentation?

A. Correct.

CP 1126 (Deposition of Clifford Walton, Pg. 37, Lines 9-21). Clifford Walton testifies that he submitted the claim to Allstate

in 2017. *Id.* He further states that prior to that time it would have been with no documentation. *Id.*

The Declaration of Melissa Hunt shows that Allstate acted promptly and in good faith. Melissa Hunt is a Claims Service Consultant for Allstate and works on coverage matters. CP 1169. **Allstate did not receive a claim for the Quiet Title Complaints and for the Bankruptcy Adversary proceeding until February 27, 2017.** *Id.* Alan Margitan called in a claim to Allstate on that date. *Id.* A letter was sent by Allstate on March 2, 2017 acknowledging receipt of the claim. *Id.*

This claim was considered by Allstate and it was determined that there was no coverage under the policies. A letter was sent on March 24, 2017 that provided an explanation of why there was no coverage or a duty to defend. *Id.* The March 24, 2017 letter 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. CP 1169-1170. The letter stated that there was no duty to defend or indemnify for the Bankruptcy matter filed by Mark Hanna and Jennifer Hanna. *Id.* A letter was sent on behalf of Allstate by Douglas Foley on March 29, 2017 that explained why there is no coverage under the “Additional Protection” section of the policy. CP 1170.

Melissa Hunt states that she reviewed the records of Allstate and there is no record of any claim filed before February 27, 2017 by Alan and Gina Margitan for the 2012 and 2014 lawsuits. CP 1170. Her Declaration shows that Allstate promptly resolved the coverage determination. CP 1169-1170.

3. Summary Judgment Order Entered in Favor of Allstate.

The Order of Summary Judgment dismissing all claims against Allstate was entered on November 10, 2018. CP 1200-1201. The court found that there is no coverage under the Allstate policies for Plaintiffs' breach of contract claim and dismissed the extra-contractual claims. *Id.* The oral opinion of Judge Cooney provides a well-reasoned analysis and is set forth below in pertinent part:

Both of the defendants have moved for summary judgment dismissal of the claims brought by the plaintiff.

Turning to Allstate, the first question is obviously whether or not they, under the terms of the contract, provide coverage for the defense of a claim connected with quieting title or declaring the rights of individuals associated with an easement

on real property. If it was either intentionally included in the policy or intentionally excluded in the policy, it would make everyone's life a lot easier. But it's not either of those two scenarios; therefore, the policy has to be reviewed to see whether there is a duty to cover a lawsuit regarding a claim to quiet title.

In looking at the policy, there's at least three sections to the policy. Unless I'm mistaken, the plaintiff is alleging coverage based upon what's contained within page 28, which is additional protections under the policy.

The first thing we need to do is look at the policy as a whole, rather than just certain sections of the policy, because one section refers to additional sections. If you look at the policy as a whole. Section 1 is entitled "Your Property," and then it goes through and discusses the dwelling protection, other structure protection, and property that's not covered. It has to do with, more or less, the physical property.

Notably, under Section 1 there's a provision on page 12 for additional protection. In addition to what's protected in Section 1, it says "additional protection" and then it goes through and indicates that additional living expenses and a few other things are also protected.

You then get to Section 2, which is family liability and guest medical protection. This is different, obviously, from Section 1 because it's set apart as Section 2. Under Section 2 it indicates other things

that are covered, primarily guest protection and expenses incurred for bodily injury and other matters that could potentially occur to somebody. Then it says under Section 2, once again, this additional protection, just like the additional protection under Section 1, although the contents of the additional protection are different.

The plaintiff indicates that under additional protection it -- Section 1 it says "claim expense" and says "we," meaning Allstate, "will pay all costs we, Allstate, incur in the settlement of any claim or the defense of any suit against an insured person." The plaintiffs argue that language, "defense of any suit against an insured person," requires either coverage or at least a duty to defend a suit against the insured person.

If you look at that portion of the sentence solely, that would require coverage of the plaintiff because there was a suit against the insured person, the Margitans, and, therefore, Allstate would be required to defend it. But we can't look at just one sentence to determine the rights and the obligations of the contracting parties. You have to look at the document as a whole.

A good example of that would be under Section 2 where it states, "We will pay the reasonable expenses incurred for necessary medical, surgical, x-ray, dental services, ambulance, hospital, licensed nursing and funeral services, prosthetic devices, eyeglasses, hearing aids, and pharmaceuticals." Because that sentence is listed in the policy doesn't make Allstate a medical

insurer under this policy. Rather, that's just once sentence of the policy and you'd have to look at the totality of the document to see exactly what is being covered by that provision.

In the same way, the defense of any suit against an insured person has to be looked at under the entirety of the document. This provision falls under Section 2, which is family liability and guest medical protection. The policy then states in addition to the limits of liability, meaning if there's a claim and liability has been -- or damages have reached the maximum limits; in addition, Allstate will pay the defense of the suit related to that liability. So that does apply to that section of the policy, not to any other suit that could be brought, regardless of the nature.

Here, what's being brought is a claim that the plaintiffs should have been either indemnified, defended, or both based upon the complaint in regards to quieting title or declaring the rights of individuals over an easement. This is outside the accidental event occurrence and property damage contemplated under the policy. For those reasons, the Court is going to find that there was no coverage for what's being alleged in the complaint under the conditions of the terms of the policy.

This policy has to be in writing. By statute, it can't be modified by oral agreement. Again, the statute is clear on that. So even if there were comments by RMI defining certain terms, without that being written, in compliance with

RCW 48.18.190, it wouldn't be binding.

Because there is no coverage under the policy, there's not a duty to either defend or indemnify under the policy and, therefore, Allstate wouldn't be in violation of the IFCA or in denying the claim wouldn't have been acting in bad faith. To act in bad faith, Allstate would have to be acting unreasonably, frivolously, or be unfounded in their reasoning, and here it does not appear they were. For those reasons, the Court is going to grant Allstate's motion for summary judgment dismissal of the claims as well.

TR 36 – 45.

4. Order Denying the Motion For Reconsideration.

The Court issued a letter ruling on November 5, 2018.

The pertinent excerpts pertaining to Allstate are set forth below:

Plaintiffs filed two causes of action against Allstate, "BREACH OF CONTRACT/ BREACH OF INSURANCE POLICY" and "BREACH OF INSURANCE POLICY/ BAD FAITH PURSUANT TO RCW § 48.01.030 / WASHINGTON CONSUMER PROTECTION ACT VIOLATION PURSUANT TO WAC§ 284-30-330." The Plaintiffs and Allstate are parties to the insurance contract. Under the terms of the contract, Allstate had no duty to defend the Plaintiffs against a lawsuit concerning a disputed easement. After Allstate identified an absence of any genuine issue(s) of material fact (by way of

the plain language of the policy), the Plaintiffs failed to produce any evidence showing a genuine issue of material fact exists regarding coverage. Therefore, if the Plaintiffs' motion for reconsideration included reconsideration of the dismissal of their cause of action for breach of contract against Allstate, the motion is denied.

The Plaintiffs move the Court to reconsider its dismissal of their claim of bad faith against Allstate. Mr. Marigtan alleges (by way of self-serving declaration) that he gave Mr. Walton a copy of the complaint and filed a claim with him in October or November of 2012 and again in July of 2014. If a claim was filed, the record shows it was never processed by Allstate. This could raise an issue of fact as to Allstate's alleged bad faith in handling the alleged claims. Allstate responds by arguing that only one claim was filed, in 2017, and was properly addressed.

Based upon the record, the Court is unable to reconsider this issue. First, it is a rarity indeed to find a citation to the record in the Plaintiffs' recitation of facts. The Court lacks the resources to once again scour the Plaintiffs' briefing and declarations in the hopes of finding support for their factual assertions. Secondly, assuming a factual basis in the record, the Court would like additional briefing as to whether a plaintiff's self-serving statement is sufficient to create a genuine issue of material fact, thereby defeating summary judgment.

The Plaintiffs' motion for reconsideration as to

their claims against Allstate are denied with the exception listed above. Should the Plaintiffs wish to pursue the remaining issue, properly citing briefings with the correct case number must be filed by November 14, 2018. Allstate's response, if any, must be filed by November 21, 2018.

CP. 1238-1241.

The Court issued a letter opinion dated November 26, 2018 Denying the Motion for Reconsideration against Allstate.

CP 1398-1399. The pertinent excerpts are set forth below:

Following the Court's ruling on Risk Management, Inc.'s and Allstate Property and Causality Insurance Company's ("Allstate") motions for summary judgment, the Plaintiffs filed a CR 59(a) motion requesting reconsideration. In a letter dated November 5, 2018, the Court reserved ruling on one issue raise by the Plaintiffs and denied the motion for reconsideration on the remaining issues. The Court requested the Plaintiffs provide additional briefing concerning whether a plaintiff's self-serving statement is sufficient to create a genuine issue of material fact and thereby defeat summary judgment. The Plaintiffs responded to the Court's inquiry by stating that they presented claims to Allstate in October or November of 2012 and in July of 2014 which were not processed by Allstate. The Plaintiff contend that since these facts are uncontested by Allstate, they must be taken as true.

The claims to Allstate by the Plaintiffs fall under

“Section II Conditions” of the policy. That section provides (in part):

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 stating: 1) your named and policy number; 2) the date, the place and the circumstances of the loss; 3) the name and address of anyone who might have a claim against an insured person; 4) the names and addresses of any witnesses.

It is undisputed that the insurance policy covers accidental loss that results in property damage or bodily injury. “Property damage” is defined as “physical injury to or destruction of tangible property, including loss of its use resulting from such physical injury or destruction.” “Bodily injury” is defined as “physical harm to the body, including sickness or disease, and resulting death.

There is no genuine issue of material fact that the cost incurred in litigating/defending an easement action falls outside the definition of “property damage” and “bodily injury” under the policy. Even if the Court accepts the Plaintiffs’ self-serving statements as true, the Plaintiffs have failed to present any admissible evidence that they suffered an accidental loss due to bodily injury or property damage as defined in the policy. Without a showing of harm caused by Allstate’s alleged bad faith, the Plaintiffs cannot succeed on a bad faith claim. *Coventry Associates v. American*

States Ins. Co., 136 Wn.2d 269, 277, 961 P.2d 933 (1998) citing *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). Lastly, contrary to the Plaintiffs' argument, the violation of a regulatory provision by an insurer does not necessarily create a causable action. *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 680, 389 P.3d 476 (2017). Here, in light of the claim not being covered under the plain language of the policy, the Plaintiffs have failed to present any admissible evidence showing they were harmed by Allstate's actions.

For these reasons, the Court is maintaining its decision entered on October 5, 2018. A presentment date is scheduled for Friday, December 14, 2018. Counsel for Allstate is directed to prepare an order denying Plaintiffs' motion for reconsideration.

CP 1403-1404. The Order Denying the Plaintiff' Motion for Reconsideration for the claims against Allstate was entered on December 12, 2018. CP 1403.

D. SUMMARY OF ARGUMENT

The insured has initial burden of showing that its claim is within the scope of coverage. *McDonald v. State Farm Fire & Casualty Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992). Margitans contend that there is a duty to defend for a Quiet Title action filed in 2012 along with an amended complaint

filed in 2014 filed in Spokane County Superior Court. The Margitans argue that the duty to defend is based upon the representations of Clifford Walton, the Allstate agent and language from the “Additional Protection Clause” in Allstate Homeowners.

The Margitan’ contend that Clifford Walton allegedly stated that there would be a duty to defend any claim as long as it was not business related or fraudulent. CP 1275. This is incorrect as the policy terms provide coverage – not statements by the agent. RCW 48.18.190 provides that no agreement modifying any contract of insurance shall be valid unless in writing and made a part of the policy

The representations of the agent play no part in the determining the duty to defend. The duty to defend is determined from the “eight corners” of the insurance contract and the underlying complaint. *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 803, 329 P.3d 59 (2014) They are basing their argument on the representations of Clifford Walton.

There is no duty to defend that lawsuit because there was no “occurrence” under the policies, and no defined “bodily injury” or “property damage” under the Homeowners Policy, or “bodily injury”, “property damage”, or “personal injury” under the Umbrella policy asserted in the lawsuit. CP 164-169. The

“Additional Protection” section of the Allstate Homeowners Policy does not apply when there is no coverage under the policy. CP 166-169. It is not a standalone provision providing for the cost of defense to the insured under the policy. The Margitans argue that their agent told them that legal fees would be paid in civil cases except for business or fraud. The agent’s oral representations cannot enlarge the scope of coverage. RCW 48.18.140 and 48.18.190 provide that insurance contracts must be in writing and include the entirety of the policy. The trial court was correct in dismissing the breach of contract claim against Allstate.

The trial court dismissed the Margitans’ extra-contractual claims for bad faith and the Consumer Protection Act as there was no coverage under the policy and no duty to defend, and Allstate did not act unreasonably. CP 1200-1201. In *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d at 277 the court stated that to succeed on a claim of bad faith, an insured must show he was harmed by the insurer’s bad faith conduct. To succeed on a CPA claim, a plaintiff must show (1) an unfair or deceptive act or practice in trade or commerce that impacts the public interest, and (2) resulting injury to the claimant’s business or property. *Am. Mfrs. Mut. Ins. Co.*, 104 Wn. App. at 697. The opinion in *Nesbitt v. Progressive Northwestern Ins.*

Co., 2012 U.S. Dist. LEXIS 155502, 2012 WL 5351846, (W.D. Wash. Oct. 29, 2012) by Judge Robert Lasnik held that failure to communicate in a timely manner absent an injury is not a CPA or bad faith claim. The *Nesbitt* decision is precisely on point in support of dismissing the Bad Faith and Consumer Protection Act claims based on failure to provide any allegation of harm from the alleged regulatory violation in response to Allstate's motion for summary judgment. CP 1162-1165.

The Declaration of Alan Margitan provides scant support for the factual allegation that he actually submitted a claim to Allstate prior to 2017. He does not provide a specific date that he reportedly submitted the claim. There are no letters, no emails, or any other type of written evidence provided here. The absence of detailed evidence makes his Declaration submitted in response to the Summary Judgment motion conclusory and self-serving. Regardless of whether a factual issue exists about when the claim was reported to the agent, Clifford Walton, or Allstate, the Margitans failed to prove damages (harm or injury) in the responsive Declaration of Alan Margitan dated September 21, 2018. CP 1046-1086.

The trial court correctly granted the Order of Summary Judgment and denied the Motion for Reconsideration.

E. ARGUMENT

(1) Standard of Review

Allstate agrees with the standard of review set forth in the Appellants' brief.

(2) Allstate Correctly Determined That There Was No Duty to Defend or Indemnify and the Breach of Contract Claim Fails.

A. The Determination of the Duty to Defend is an Issue of Law Based on the Policy and the Underlying Complaint.

This section will address Appellants' First and Third Assignments of error. The First Assignment of error states that 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. The Third Assignment of error states that trial court erred in failing to find material issues of fact are in dispute regarding Allstate's duty to defend under the policy.

These assignments of error miss a fundamental point by stating there is an issue of fact for the determination of duty to defend. There is no factual inquiry for the duty to defend, subject to certain limited exceptions, as the determination of the duty to defend is an issue of law based upon the underlying

complaint and the policy terms. The duty to defend generally is determined from the “eight corners” of the insurance contract and the underlying complaint. *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d at 803.

The rule regarding the duty to defend is well settled in Washington: a duty to defend exists only when the claim alleges facts which could, if proven, impose liability upon the insured within the insurance policy’s coverage. *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) An insurer has no duty to defend an insured when the claims asserted against the insured are clearly outside the coverage of the policy. *Holly Mountain Resources v. Westport Ins. Corp.*, 130 Wn.App. 635, 647, 104 P.3d 725 (2005).

B. There Was No Coverage Or Duty To Defend The Quiet Title Litigation.

In October 2012, the Hannas, Margitans’ neighbors, brought a quiet title complaint against the Margitans (CP 1051). In July 2014 the Hannas amended their complaint. (CP 30, 1052). The Hannas brought the quiet title litigation for the purpose of declaring rights in the use of property and access to property.

The Hannas were not suing for “property damage” but only with respect to the rights in property that they sought to adjudicate. Such legal rights – even if impaired -- do not qualify as “property damage.” There is no “occurrence” and no “property damage” based on the original and amended complaints. The “Opening Narrative” for all of the claims state, in material part:

“This is an action to resolve what easements exist on certain land (a short plat) located along the shoreline of Long Lake in northern Spokane County and who has rights to use the easements. This action is also to resolve what structure may be built on the final Short Plat and where they may be built as per the Short Plat. * * *.”

CP 176-177.

The Complaint is described as an action to resolve interests in property and the right to determine which structures may be built given the restrictions of the Short Plat. *Id.* There is no “occurrence” under the terms of the Homeowners and Personal Umbrella Policy. There is no claim for defined “bodily injury” “property damage” under the Homeowners Policy or “bodily injury” “property damage” or “personal injury” under the Umbrella policies. The Margitans’ brief in

response to the motion for summary judgment fails to argue that the written provisions of the Additional Protection clause are a basis for the duty to defend and they fail to argue that a duty to defend exists from the written terms of the Allstate policies.

In *Kazi v. State Farm Fire & Casualty Co.*, 24 Cal. 4th 871, 874, 15 P.3d 223 (2001) the court addressed coverage for an easement dispute. The insured was sued for interfering with an easement and tendered that defense to their insurer. The Court determined that State Farm had no duty to defend or provide coverage for the lawsuit since interference with an easement frustrates the right of access by the easement holder to the burdened property, regardless of the method used to obstruct it, i.e., whether the easement is cordoned off or is physically damaged. In either case, the Court held that the remedy is the same - the plaintiff must request that the obstruction be removed. The damages are also the same in either case: the dominant estate's loss of rental value and diminished property value, or loss of the easement's fair market value. In neither case, however, may an easement holder sue for damages to the underlying property, which the owner of the servient estate holds in fee title. *Id.*

The Margitans’ argue that under the terms of the Homeowners Policy there is coverage under the “Additional Protection” clause for the costs incurred by the Plaintiffs for defense costs. This clause only applies if there is coverage under the policy. It is not a standalone provision providing for the cost of defense to the insured under the policy. The Homeowners policy provides in pertinent part:

“Definitions Used In This Policy

Throughout this policy, when the following words appear in bold type, they are defined as follows:

6. **Insured person(s)** means **you** and, if a resident of **your** household:
- a) any relative; and
 - b) any person under the age of 21 in your care.

* * *

13. **We, us** or **our** means the company named on the Policy Declarations.”

* * *

CP 173, Foley Dec., Ex. 4, Pgs. 172-174.

The policy was endorsed with form AP4710, which provides:

“Amendment of Policy Provisions – AP4710

This endorsement is part of the policy to which it is attached and provides benefits under the policy for parties to a domestic partnership or civil union. In order to receive benefits in accordance with this endorsement, the domestic partnership or civil union must be recognized by the state in which this policy was issued.

I. Under **Definitions Used In This Policy**, “**You**” or “**your**” is replaced by the following:

“**You**” or “**your**” means the policyholder named on the Policy Declarations and:

- a) that person’s resident spouse; or
- b) if a resident of the same household, a party who has entered into a domestic partnership or civil union, as recognized by the state in which this policy was issued, with the policyholder named on the Policy Declarations.

II. The following change is made to the provisions throughout **your** policy documents:

The term “spouse” also includes, if a resident of the same household, “a party who has entered into a domestic partnership or civil union, as recognized by the state in which this policy was issued, with the policyholder named on the Policy Declarations.”

All other policy terms and conditions apply.”

The “**Additional Protection**” coverage provides, as follows:

“Additional Protection

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

1. **Claim Expense**

We will pay:

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

b) interest accruing on damages awarded until such time as **we** have paid, formally offered, or deposited in court the amount for which **we** are liable under this policy; interest will be paid only on damages which do not exceed **our** limits of liability;

c) premiums on bonds required in any suit **we** defend; **we** will not pay bond premiums in an amount that is more than **our** limit of liability; **we** have no obligation to apply for or furnish bonds;

d) up to \$150 per day for loss of wages and salary, when **we** ask **you** to attend trials and hearings;

e) any other reasonable expenses incurred by an **insured person** at **our** request.”

CP 173, Foley Dec., Ex. 4, Pg. 198.

The definitions of the policy state that the bolded terms “we” “us” and “our” refer to the company on the policy Declarations, Allstate Property and Casualty Insurance Company. Specifically, with respect to (a), the coverages apply to the costs incurred by Allstate, not by a defined “**insured person.**” The **Additional Protection** coverage applies where, otherwise, the coverages of the policy also apply – and then in addition to the limits of liability, **Additional Protection** is allowed for costs, interest, premiums on bonds or other reasonable expenses indicated at (a) through (e). Accordingly, there is no basis in the policy to apply **Additional Protection** where, as here, there is no coverage for the claims asserted.

A similar analysis applies for the Personal Umbrella Policy. The Margitans did not argue in their response brief any coverage or duty to defend issues with regard to the Personal Umbrella Policy. The Personal Umbrella Policy provides:

“Additional Payments We Will Make

In defending an **insured person**, **we** will pay the following regardless of **our** limits of liability:

1. Premiums on appeal bonds and on bonds to release attachments. **We** have no obligation to apply for or furnish these bonds.
2. Court costs for defense.

3. Interest accruing on damages awarded. **We** will pay this interest only until **we** have paid, tendered or deposited in court the amount of damages for which **we** are liable under this policy. **We** will only pay interest on the amount of damages for which **we** are liable under this policy, not exceeding **our** limits of liability.”

CP 173, Foley Dec., Ex. 5, Pg. 18. The language states that the additional payments will be made only “[I]n defending an insured person...” *Id.*

In construing a written contract, a court will not read an ambiguity into a contract that is otherwise clear and unambiguous. *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). When interpreting a contract, the contract will be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective. *Washington Pub. Util. Districts’ Utilities Sys. v. Pub. Util. Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989).

The trial court properly determined that no duty to defend or indemnify exists under the policy. Appellants’ breach of contract claim fails.

C. Oral Representations of the Insurance Agent Do Not Enlarge the Coverage of the Written Insurance Policy.

The Margitans make the argument that their Allstate agent believed the Additional Protection Clause provides a basis for the duty to defend. Oral representations of the agent do not enlarge the terms of the insurance policy.

RCW 48.18.190 provides that no agreement modifying any contract of insurance shall be valid unless in writing and made a part of the policy, as set forth below:

No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.

Judge Cooney properly concluded that there is no coverage or duty to defend and no breach of contract claim in this lawsuit. CP 1200-1201.

(3) No Damages Were Established for the Bad Faith and Consumer Protection Act Claims.

Appellants' Fifth Assignment of error states that the trial court erred in finding that the Margitans had no damages due to no duty to defend under the Allstate policy. The Declaration

that Alan Margitan submitted in response to Allstate's Motion for Summary Judgment does not provide any specific evidence that the Margitans suffered any specific harm as a result of Allstate's alleged regulatory violations. As explained in the preceding section, there was no coverage under the Allstate policy. The Declaration of Alan Margitan simply does not allege any damages sufficient to defeat summary judgment.

Both the bad faith claim and the CPA claim require actual damages to be proven. In *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 277, 961 P.2d 933 (1998) the court stated that to succeed on a claim of bad faith, an insured must show he was harmed by the insurer's bad faith conduct. To succeed on a CPA claim, a plaintiff must show (1) an unfair or deceptive act or practice in trade or commerce that impacts the public interest, and (2) resulting injury to the claimant's business or property. *Am. Mfrs. Mut. Ins. v. Osborn*, 104 Wn. App. at 697.

The opinion in *Nesbitt v. Progressive Northwestern Ins. Co.*, 2012 U.S. Dist. LEXIS 155502, 2012 WL 5351846, (W.D. Wash. Oct. 29, 2012) by Judge Robert Lasnik held that failure to communicate in a timely manner absent an injury is not a CPA claim. The *Nesbitt* decision is precisely on point in support of dismissing the claims of Bad Faith, and Consumer

Protection Act claims based on failure to provide any allegation of harm from the alleged regulatory violation on summary judgment had they occurred.

The Court in *Nesbitt* explained that failure to communicate in a timely manner absent an injury is not a CPA or bad faith claim, as shown below:

Plaintiff relies on the same facts underlying his claim of bad faith to assert a claim that Progressive violated the CPA. See Response at 8-9. Progressive does not respond to plaintiff's allegation that it violated The Unfair Claims Settlement Practices Regulation in its reply, but asserts that plaintiff has not suffered any resulting injury and therefore, his claim cannot succeed. Reply at 7-9. The Court agrees with Progressive. **Although plaintiff may be able to establish that Progressive engaged in an unfair or deceptive act by failing to communicate with him in a timely manner, he has not provided any evidence that the alleged unfair act resulted in injury to his business or property.** Plaintiff's assertion that Progressive's conduct "caused him to suffer real and actual damages" is insufficient to defeat summary judgment. (Emphasis Supplied)

Id. at *9-10.

In summary, Alan Margitan's Declaration in response to the motion for summary judgment was conclusory and failed to

allege any monetary damages. The bad faith and Consumer Protection Act claims fail as a matter of law due to the failure to prove harm or injury.

(4) No Issues of Material Fact Exist.

Appellants' Second and Fourth Assignments of error will be addressed in this section. The Second Assignment of Error states that the trial court erred in failing to find material issues of fact are in dispute regarding 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 Fourth Assignment of Error states that the trial court erred in holding that there were no material facts in dispute as to the Washington Consumer Protection Act.

There was no coverage under the policy for either a duty to defend or indemnify as discussed in the preceding sections. The court was correct in finding that there was no issue of fact for the breach of contract, bad faith and CPA claims. *Id.* at 1200-1201.

Clifford Walton testified that he did not submit a claim to Allstate until 2017. CP 1126. The Declaration of Melissa Hunt states that the first time Allstate was aware of the claim was on February 27, 2019. CP 1170.

The insured bears the burden of demonstrating the insurer acted in bad faith when it refused to defend its insured by demonstrating that refusal is “unreasonable, frivolous, or unfounded.” *Truck Ins. Exchange v. VanPort Homes, Inc.*, 147 Wn.2d at 777 (2002). As explained in the preceding section, there was a failure of proof in establishing injury or harm in the Declaration Alan Margitan submitted in response to the motion for summary judgment. CP 1046-1056. He did not allege facts in his Declaration sufficient to establish the elements of the Bad Faith and Consumer Protection Act claims.

The Declaration of Alan Margitan provides little support for the fact that he actually submitted a claim to Allstate prior to 2017. His statements are conclusory and self-serving. He does not provide a specific date that he reportedly submitted the claim. There are no letters, no emails, or any other type of written evidence provided here. He does not explain why he waited nearly five years before making a claim directly with Allstate in 2017. The absence of detailed evidence makes his Declaration submitted in response to the Summary Judgment motion conclusory and self-serving.

At best, Alan Margitan inquired with the agent about the possibility of making a claim. Allstate did not receive the claim

until 2017. CP 1170. There is not sufficient evidence to support a claim for alleged insurance Bad Faith or CPA claim.

In *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497-498 (9th Cir. 2015) the Ninth Circuit Court of Appeals stated that a self-serving declaration does not always create a genuine issue of fact for summary judgment, and that a court can disregard a self-serving declaration that states only conclusions and not facts that would be admissible in evidence, as shown below:

We have previously acknowledged that declarations are often self-serving, and this is properly so because the party submitting it would use the declaration to support his or her position. *S.E.C. v. Phan*, 500 F.3d 895, 909 (9th Cir. 2007) (holding that the district court erred in disregarding declarations as “uncorroborated and self-serving”). Although the source of the evidence may have some bearing on its credibility and on the weight it may be given by a trier of fact, the district court may not disregard a piece of evidence at the summary judgment stage solely based on its self-serving nature. See *Id.* **However, a self-serving declaration does not always create a genuine issue of material fact for summary judgment: The district court can disregard a self-serving declaration that states only conclusions and not facts that would be admissible evidence.** See *Id.*; see also, *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1059 n.5, 1061 (9th Cir. 2002) (holding that the district court properly disregarded the

declaration that included facts beyond the declarant's personal knowledge and did not indicate how she knew the facts to be true); *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) (“**A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.**”). (Emphasis supplied)

Further support for the declaration to have sufficient facts is the decision of the Washington Court of Appeals *In re Marriage of Schwarz*, 192 Wn. App. 180, 214-215, 368 P.3d 173, 190-191 (2016) where the court stated that “[I]t is reasonable to require the party's testimony to be supported by, e.g., documentary evidence, an admission by their party-opponent, or the testimony of another witness.” In *Baldwin v. Silver*, 165 Wn. App. 463, 471, 269 P.3d 284 (2011) the court stated that a nonmoving party cannot defeat a motion for summary judgment with conclusory statements of fact.

The trial court properly granted Summary Judgment in favor of Allstate on Plaintiffs' Bad Faith and CPA claims.

(5) Appellants' Brief Proposes New Theories of the Case That Were Not Argued Before the Entry Of the Order For Summary Judgment.

CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). That is exactly what the Margitans were attempting to do in their supplemental briefing on the motion for reconsideration.

The Declaration of Alan Margitan filed on September 21, 2018 in response to Allstate's motion for summary judgment did not allege and harm or injury for the CPA and bad faith allegations, as previously discussed. CP 1046-1086. A second Declaration of Alan Margitan was filed on November 14, 2018. CP 1303-1319. This was an attempt to create an issue of fact after the Court had already granted Summary Judgment in favor of Allstate. Even in the Declaration of November 14, 2018 Alan Margitan fails to sufficiently state any harm or injury from the extra-contractual allegations.

The Margitans failed to argue that there was coverage or a duty to defend under the written terms of the Allstate Policy in their original Response Brief to Allstate's Motion for Summary Judgment (titled "Reply Brief) filed on September 21, 2018. CP 1021-1045. They failed to preserve this issue for

appeal. The trial court found that there was no duty to defend or indemnify under the policies.

There was no argument in the Response Brief filed on September 21, 2018 for the contention that the “Additional Protection” provision of the Homeowners Policy provided coverage for their legal fees. *Id.* This issue was not properly reserved for review as the Margitans did not include any legal argument on the “Additional Protection” provision in their Response brief to the Summary Judgment Motion. CP 1021 – 1043. The trial court correctly determined that this provision of the policy was only applicable when there was coverage under the policy. CP 1200-1201, TR 44-45.

In *Int'l Raceway, Inc. v. JDFJ Corp.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999) the court stated that Civil Rule 59 does not permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case. The court found that the motion for reconsideration was in essence an inadequate and untimely attempt to amend its complaint in general, violating equitable rules of estoppel, election of remedies, and the invited error doctrine. The court concluded that “[W]e refuse to permit such a perversion of the rules.” *Id.*

F. CONCLUSION

The decision of the trial court should be affirmed.

DATED this 4th day of June, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Douglas F. Foley, certify that I mailed, or caused to be mailed, a copy of the foregoing Respondent's Brief, postage prepaid, via U.S. Mail and by email, to the following counsel of record at the following address:

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