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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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NO. 370402

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION III

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WALTER FERNAU III,

Plaintiff/Appellant

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY

Defendant/Respondent

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OPENING BRIEF OF APPELLANT WALTER FERNAU III

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## I. INTRODUCTION

Mutual of Enumclaw sold Dr. Fernau an “All-Risk Policy,” promising to cover his residence for damages caused by all perils, except those expressly excluded by the policy. The policy did not expressly exclude damage caused by operation of boats and distinguished the perils of damage caused by vehicles from water damage. Dr. Fernau paid Mutual of Enumclaw all the required premiums under the policy.

After moving into his home, Dr. Fernau observed lake-goers during the summer months operating their wake board and surf boats very close to shore in a manner that created excessively large wakes. The excessive wakes cascading from these boats would climb over the retaining wall which protected Dr. Fernau’s property from the natural waves of the lake. Subsequently, these wakes crashed into Dr. Fernau’s yard. The water from the wakes would then leach back through the wall, pulling away the supporting material and undermining the structure of Dr. Fernau’s dock and his home. After numerous wakes crashed over the retaining wall, giant cracks appeared in the foundation of the home. The walls began to crack, doors began to stick closed, all due to the settlement caused by the operation of boats.

Dr. Fernau made a claim under his all-risk policy. Enumclaw investigated the claim and its own engineer acknowledged that the operation

of these large wake boats may be causing the problem. However, in an attempt to avoid paying for the damage caused to Dr. Fernau's property by boat operators, Mutual of Enumclaw, through use of linguistic acrobatics, argues that damage from waves, no matter the cause of the wave, is not covered under the policy.

At Summary Judgment, Mutual of Enumclaw argued that a wake, even when caused by the volitional act of a third party is still just a wave subject to the exclusionary language in the policy. Mutual of Enumclaw's argument ignores Washington law regarding proximate cause. Even if a trier of fact were to determine that natural waves contributed to the loss, the issue should still be presented to the trier of fact to determine what the efficient proximate cause of the loss is.

Unfortunately, the trial court accepted Mutual of Enumclaw's argument and dismissed Dr. Fernau's claims for breach of contract, and violations of the Insurance Fair Conduct Act – leaving only claims of bad faith under the Consumer Protection Act based on Mutual of Enumclaw's additional violations of Washington law arising from failures to properly respond pending.

Under Washington law, Insurers are not permitted to hide behind open-ended exclusionary language to avoid liability for damage caused by perils that are not excluded from an all-risk policy. The question before this

court is whether the trial court erred by failing to apply the efficient proximate cause rule and dismissing claims for denial of coverage under an all-risk policy for damage caused by the operation of boats.

## **II. ASSIGNMENTS OF ERROR**

### **Assignments of Error:**

1. The trial court erred in granting summary judgment against Dr. Walter Fernau III and dismissing his claim for breach of contract regarding insurance coverage.

2. The trial court erred in granting summary judgment against Dr. Walter Fernau III and dismissing his claim under the Insurance Fair Conduct Act.

### **Issues Pertaining to Assignment of Error:**

1. Dr. Fernau's all-risk insurance policy excludes coverage for the peril of water damage, but the policy does not exclude, and therefore covers damages caused by the operation of boats. Mutual of Enumclaw denied coverage based on the water damage exclusion. The evidence presented at summary judgment included statements that the cause of Dr. Fernau's damage is the wakes generated by the operation of boats. Where the operation of the boats is a cause separate and distinct from the water damages for purposes of applying the efficient proximate cause rule, did the

trial court err in dismissing on summary judgment Dr. Fernau's claim for breach of contract? (Assignment of Error 1).

2. Based on the same facts outlined in Issue 1, did the trial court err in dismissing on summary judgment Dr. Fernau's claim for violation of the Insurance Fair Conduct Act? (Assignment of Error 2)

### **III. STATEMENT OF THE CASE**

#### **A. FACTS**

1. In June of 2012, Dr. Walt Fernau III purchased a home for \$380,000 on Newman Lake at 22931 E. Park Beach Rd. At the time of the purchase, he had an inspection completed by a certified home inspector as well as a structural engineer. The house was originally built in 1920 and substantially remodeled in 1995. At the time of purchase, there was some indication of repairs due to prior minor settlement. While the inspector confirmed that some minor settlement had previously occurred, he did not identify any conditions that would cause additional settlement. (CP 114 ¶3.)

2. The home sits relatively close to the waterfront, approximately 13 ½ feet. At the time of the purchase, there was a retaining wall on the lakeshore separating the water from the property. On the part of the lake where Dr. Fernau's house sits, the water is relatively deep close to the shore. (CP 114-115 ¶4.)

3. In December 2013, Mutual of Enumclaw issued an all-risk homeowners insurance policy (“Policy”) to Dr. Fernau covering his property. (CP 53-59 ¶5, CP 115 ¶5.)

4. The policy specifically addresses a number of perils. For example, the policy states in “Section I Perils Insured Against:”

However, we do cover breakage of the property by or resulting from:...

d. aircraft, vehicles, vandalism and malicious mischief, or volcanic eruption...

f. water not otherwise excluded;

(CP 57.)

5. Dr. Fernau has paid all of the premiums for the Policy since its issuance. (CP 115 ¶7.)

6. During the late spring and early summer months, Dr. Fernau began to observe boats coming near the shoreline. These boats generated abnormally large wakes. These wakes were so large that individuals were able to surf on the wake behind the boat without holding on to a rope. When the boats were operated close to the shore, the large wakes would come up, over and through the retaining wall and crash into Dr. Fernau’s yard. The water would then leach back out through the wall, pulling soil with it. (CP 115 ¶9.)

7. Since purchasing his Property, Dr. Fernau has continuously resided at the Property. (CP 115 ¶ 8.)

8. While residing there, Dr. Fernau and his neighbors observed that the operation of boats destroyed docks, retaining walls, and even caused large trees near the shoreline to fall. (CP 115 ¶11, CP 96 ¶7.)

9. Additionally, a shared parking area began to collapse into the lake due to the erosion. (CP 115 ¶¶11-12.)

10. These issues with large wakes even became the subject of articles in *The Spokesman-Review*. (CP 120 ¶14, CP 131-135.)

11. After observing the wakes caused by these boats, Dr. Fernau began to notice cracking in the sheetrock walls of his house and shifting of the windows inside the home. Dr. Fernau did not initially make the connection that the large wakes created by these boats were causing the damage. Instead, he hired a contractor to stabilize and make repairs to his home. (CP 116 ¶13.)

12. The contractor started efforts to prevent further movement; however, he discovered a “sink hole” in the yard between the home and the lake, where the soil had been carried away. (CP 116 ¶14.)

13. On February 4, 2016, Dr. Fernau contacted Mutual of Enumclaw to request coverage for the damages to his property. (CP 116 ¶15.)

14. On February 8, 2016, Mutual of Enumclaw sent out Rod Layton, an adjustor, and Jason Erickson of Erickson Engineering, to inspect the property. (CP 116 ¶¶16-17.)

15. Mr. Layton's and Mr. Erickson's inspection revealed widespread damages to Dr. Fernau's home. The damages, as identified in Erickson Engineering's report, include: cracks in the sheetrock walls, ceiling coverings, tile floor, and window frames; sloping in the upper-level floor; a gap between the wall framing and the floor; and several cracks in the perimeter foundation wall, all which Dr. Fernau confirmed had developed since he had been living in the house. (CP 116 ¶17, CP 60-65.)

16. During the inspection, Dr. Fernau specifically informed the inspector that he believed that the large wakes from the wakeboarding/surf boats were causing the erosion of the soil around the foundation of his home. (CP 116 ¶16.)

17. Jason Erickson prepared his report and specifically indicated that "wave action at the shoreline may be adversely affecting the foundation and should be investigated by a geotechnical engineer." (CP 65.)

18. Mutual of Enumclaw did not further investigate this claim. Instead, on March 28, 2016, Mutual of Enumclaw denied Dr. Fernau's claim, stating that the basis for denial of the claim was that the Policy excluded coverage for loss or damage caused by:

“...faulty, inadequate or defective: planning, surveying, siting, design, workmanship, construction, remodeling, compaction, materials used in construction or renovation...”

and further, that Mutual of Enumclaw does not insure for loss for:

“...wear and tear, inherent vice, or latent defect nor settling, shrinking, bulging or expansion, including resultant cracking of pavements, patios, foundations, walls, floors, roofs or ceilings...”

and

“Further, we will not pay for loss or damage caused by earth movement or water damage, including waves or tidal water whether wind driven or not.”

(CP 75.)

19. Dr. Fernau moved forward with repairs to his home to save it from further damage including possible collapse. Initially, he funded the repairs through a line of credit; however, the repairs required were so substantial that he had to refinance his home in order to get enough cash to make the necessary repairs. (*See* Complaint at CP 6 ¶3.21 and Respondents answer at CP ¶20 ¶3.16; *see also* CP 116-117 ¶20.)

20. The remediation efforts required the complete removal of a deck, which was also connected to the dock. (CP 117 ¶21.)

21. Since the damage occurred, Dr. Fernau has not been able to enjoy his home. He has not been able to entertain individuals, including his grandchildren, on the property in the way he intended out of a fear that someone will get hurt. (CP 117 ¶22.)

22. On August 28, 2017, Dr. Fernau's counsel sent a letter to Mutual of Enumclaw requesting that it reconsider its denial of coverage. The letter emphasized that the actual cause of the damage to his home was the operation of wake/surf boats. (CP 81-84; CP 117 ¶23.)

23. Mutual of Enumclaw failed to respond or even acknowledge the letter. In fact, Dr. Fernau received no further response from Mutual of Enumclaw, until after he filed a complaint with the Washington State Insurance Commissioner in late October 2017. (CP 117 ¶24; CP 119-123.)

24. When Mutual of Enumclaw finally responded in November 2017, Mutual of Enumclaw did not indicate that it would further investigate the claims. Instead it simply informed Dr. Fernau that its coverage position had not changed and it denied any coverage for the loss. (CP 88-89, CP 120 ¶¶9-10.)

25. Accordingly, Dr. Fernau filed a lawsuit. (CP 120 ¶11, CP 117 ¶26.)

## **B. PROCEDURE**

Dr. Fernau brought this action against Mutual of Enumclaw in Spokane County Superior Court on February 28, 2018. (CP 1-13.) Mutual of Enumclaw filed an answer on October 8, 2018, wherein Mutual of

Enumclaw made blanket denials of Dr. Fernau's claims characterizing the negligence complained of as an Act of God. (CP 21.)

Mutual of Enumclaw filed a motion for summary judgment. (CP 30-31.) Dr. Fernau filed a memorandum and supporting documents in opposition to summary judgment. (CP 94-135.)

On March 8, 2019, after hearing oral argument, the trial court entered an order granting Enumclaw's motion as to claims for improper denial of coverage, and denying summary judgment as to the improper claims handling. (CP 158-160.) A final order was issued on August 8, 2019 whereby Dr. Fernau dismissed his remaining claims for bad faith under the Consumer Protection Act, allowing him to pursue this appeal. (CP 161-166.)

Dr. Fernau filed a notice of appeal with this Court on August 28, 2019, specifically challenging the trial court's summary judgment order dismissing his breach of contract claim and his Insurance Fair Conduct Act claim, both of which arose out of Mutual of Enumclaw's denial of coverage under the all-risk policy. (CP 167-168.)

## IV. ARGUMENT

### A. Standard of Review

On appeal the court reviews an order granting summary judgment *de novo*. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124, 1127 (2000). Likewise, “interpretation of language in an insurance policy is a question of law [that is] reviewed *de novo*.” *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300, 305 (2012).

The trial court may only grant summary judgment, if it determines there is “no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). “A genuine issue of material fact exists... [if] reasonable minds could differ on the facts controlling the outcome of the litigation.” *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn. 2d 545, 552, 192 P.3d 886, 889 (2008). Accordingly, a motion for summary judgment should only be granted if, after viewing all the evidence and inferences in the light most favorable to the nonmoving party, “reasonable persons could reach but one conclusion.” *Vasquez v. Hawthorne*, 145 Wn.2d 103, 106, 33 P.3d 735, 737 (2001) (*citing Ellis v. City of Seattle*, 142 Wn.2d 450, 458. 13 P.3d 1065, 1067 (2000)).

## **B. General Insurance Law Favors Finding Coverage**

Courts in Washington construe insurance policies as the average person purchasing insurance would, giving the language “a fair, reasonable, and sensible construction.” *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300, 305–06 (2012) quoting *Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wash.2d 618, 627, 881 P.2d 201, 206-207 (1994) (quoting *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wash.2d 50, 65, 882 P.2d 703, 712 (1994) (quoting *Grange Ins. Co. v. Brosseau*, 113 Wash.2d 91, 95, 776 P.2d 123, 125 (1989))). Where a term is undefined, it is assigned its ordinary meaning. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300, 306 (2012). Any ambiguities in the policy are construed against the drafter-insurer. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300, 306 (2012) citing *Queen City Farms*, 126 Wash.2d 50, 68, 882 P.2d 703, 713 (citing *Greer v. Nw. Nat'l Ins. Co.*, 109 Wash.2d 191, 201, 743 P.2d 1244, 1249 (1987)).

As for exclusions, because they “are contrary to the fundamental protective purpose of insurance,” the courts construe exclusions strictly against the insurer. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300, 306 (2012) (citing *State Farm Fire & Cas. Co. v. Ham & Rye LLC*, 142 Wash.App. 6, 13, 174 P.3d 1175, 1179 (2007)).

Furthermore, the courts “will not extend [exclusions] beyond their clear and unequivocal meaning.” *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300, 306 (2012).

This court should strictly construe any exclusions claimed by Mutual of Enumclaw and resolve any ambiguity in the policy in favor of finding coverage for Dr. Fernau’s loss in this case. In applying these general principles of insurance law to the present case, summary judgment is improper and the trial court’s decision should be reversed.

**C. Operating a Boat in a Manner that Causes Damage is a Covered Peril under the All-Risk Policy issued by Mutual of Enumclaw**

In addition to the general principles of insurance law, it is important to understand that the Policy at issue in this case is an all-risk policy. All-risk insurance policies are intended to “provide coverage for all risks unless the specific risk is excluded.” *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 513, 276 P.3d 300, 306 (2012). Accordingly, “any peril that is not specifically excluded in the policy is an insured peril.” *Id.*

The result is that all-risk insurance policies allocate risk to the insurer rather than the insured. *Vision One*, 174 Wn.2d at 514, 276 P.3d 300, 306. Stated another way, the insurer, Mutual of Enumclaw, bears the risk that a catastrophe not mentioned in the policy will occur. *Id.* (citing *Frank*

*Coluccio Constr. Co. v. King County*, 136 Wn. App. 751, 767, 150 P.3d 1147 (2007)).

### **1. Boat Operation is not an Excluded Peril**

Here, there is no cited exclusion for damage caused by the acts of others. (CP 75-80.) More specifically, damage caused by boat operation is not an excluded peril under the policy. (CP 53-59.) Despite the fact that Mutual of Enumclaw sold an all-risk policy for a property on a lake that permits boat use, Mutual of Enumclaw has not identified any policy provision that excludes damage caused by boat operation. (CP 75-80; 88-89; 34-48.) In the absence of clear language excluding such a peril, Mutual of Enumclaw contractually agreed to provide coverage for damage caused by boat operation. *See generally Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 513, 276 P.3d 300 (2012).

### **2. Intentionally Operating a Boat in a Manner that would Reasonably be expected to Cause Damage is a Covered Loss.**

In addition to not excluding damage caused by operation of a motor boat, Mutual of Enumclaw's all-risk policy expressly provides coverage for loss "caused by vandalism and malicious mischief," provided the dwelling was not "vacant for more than 30 consecutive days immediately before the loss." (CP 57.) This provision providing for vandalism and malicious

mischief coverage further reinforces a determination that Dr. Fernau's loss is covered by the policy.

While the policy, does not define the terms "vandalism" or "malicious mischief," Washington courts have previously interpreted these terms in the context of an insurance policy. *See Bowers v. Farmers Ins. Exchange*, 99 Wn. App. 41, 45 991 P.2d 734 (2000). In *Bowers*, the court held that when a policy does not define certain terms, courts interpret the policy as an average person would and give undefined terms their plain meaning. *Id.* Specifically, Washington courts have found that "[p]roperty has been damaged 'willfully and maliciously' if the damage results from an intentional act from which damage was reasonably expected to result." *Id.* at 46. The court in *Bowers* interpreted the policy to find that

"In this context, malice does not require ill will, hatred, or vindictiveness of purpose. Malice may be inferred from the act of destruction. It is sufficient if the actor is guilty of wanton or intentional disregard of the rights of others."

*Id.* In reviewing the facts of the case, it is clear there is no requirement that the evidence show that an individual was acting with specific intent to cause damage to the property, or that the actor is motivated by actual malice, only that the individual should have reasonably foreseen that a volitional act would cause damage. *See generally Id.*

Here, the boat operators are intentionally creating large wakes for people to wakeboard or surf on. (CP 140.) The law specifically requires boat operators to not pilot the boats in a manner that causes damage to adjacent property. RCW 79A.60.030 While the operators may not have the specific intent to cause damage, it is reasonable to expect that damage will occur. Particularly since, as Mutual of Enumclaw's counsel argued, these boats were specifically designed to create large wakes. (RP 5.) Especially when these large wakes crash over the retaining walls of the shoreline properties and newspaper articles are written about the destruction caused by these boats. (CP 131-135.) Accordingly, the operation of these boats amounts to vandalism or malicious mischief for purposes of insurance policy interpretation under Washington law.

Since Dr. Fernau has continuously resided at the property during the coverage of this Policy (CP 115 ¶8.) the damage caused by these intentional acts is expressly covered by the policy and the exception for property that has been vacant is inapplicable. (*See generally* CP 53-59, *see* CP 57.)

**3. Whether the Boat Operators Actions amount to Negligence, Vandalism, or Malicious Mischief is a Question of Fact**

At the trial court level, Mutual of Enumclaw essentially argued that because these boats were designed to make large wakes, there is no negligence in this case. (RP 5-6; 25-26) First, this ignores the fact that the

policy does not exclude damage caused by boats, regardless of whether the operator is negligent. However, Mutual of Enumclaw ignores Washington law which defines and prohibits negligent boat operation. A Washington statute specifically states:

“A person shall not operate a vessel in a negligent manner . . . meaning operating a vessel in disregard of careful and prudent operation . . . taking into account freedom from obstruction to view ahead, effects of vessel wake, and so as not to unduly or unreasonably endanger life, limb, property or other rights.

RCW 79A.60.030 (underline added). Washington State permits deputies to ticket boaters who create waves that cause property damage, even if the boats are operating outside of the no-wake zone. *Id.* In reality, the fact that these boats were designed to be able to make large wakes means that the operators are on special notice that they need to be extra sensitive to the potential of damage to property owners along the lakefront.

Regardless of the type of boat or the size of the wake it creates, under Washington law it is negligent to operate boats in such a way that unreasonably endangers property. *See* RCW 79A.60.030.

Whether specific acts by a person constitute negligence is a question of fact for the jury. *See Rhoades v. DeRosier*, 14 Wash. App. 946, 948-50, 546 P.2d 930, 933 (1976) (stating that questions concerning a motorists negligence “are usually questions of fact and should be withdrawn from the

jury only in rare cases.”); *See also Washburn v. Ensley*, 53 Wash. 2d 570, 573, 335 P.2d 471, 473 (1959) (holding that whether a passenger on a boat was negligent in his conduct or “was that of a reasonably prudent man... was a question of fact for the jury.”); and *Hough v. Ballard*, 108 Wash. App. 272, 284, 31 P.3d 6, 12 (2001) (holding that whether a person’s “excessive speed was a proximate cause of the accident is a question of fact for the jury and is not to be resolved by the trial court as a matter of law.”)

In the present case, there is at least a genuine issue of material fact as to whether the third-party boat operators piloted their boats in a negligent manner or in wanton disregard of another’s property. Such an issue precludes the granting of summary judgment in this case.

**4. Whether Boat Wakes are Viewed as a Single Cause or Multiple Causes, There is Coverage under the Policy.**

At the summary judgment hearing, Mutual of Enumclaw also argued against the application of the efficient proximate cause rule, claiming that “it makes no sense” to separate the operation of boats from the waves produced by such operation. (CP 140.) At summary judgment, Mutual of Enumclaw argued that under *Kish v. Ins. Co. of North America*, when the loss is caused by a single event that is susceptible to various characterizations, the efficient proximate cause analysis has no application.

(CP 140 discussing *Kish v. Ins. Co. of North America*, 125 Wn.2d 164, 170, 883 P.2d 308, 311 (1994).)

*Kish*, involved a claim for coverage caused by a flood. Under the insurance policy at issue in *Kish*, flood was an excluded peril. *Id.* at 166, 883 P.2d at 309. The Plaintiff in *Kish* argued that because the flood was caused by rain, which was not an excluded peril, there should be coverage. *Id.* at 166, 883 P.2d at 309-310. The Court determined that rain was not a distinct peril from the peril of a flood and that the average purchaser of insurance would expect the term “flood” to include a rain-induced flood. *Id.* at 171, 883 P.2d at 312.

The decision in *Kish*, highlights that the characterization of perils is a question of contract. *See Id.* at 171, 883 P.2d at 311-12. That is, do the terms of the policy at issue treat the perils as separate from each other? *See Sunbreaker Condominium Ass’n v. Traveler’s Ins. Co.*, 79 Wn. App. 368, 376, 901 P.2d 1079, 1083 (1995). In applying that principle to the current case, the question here is whether operation of a vehicle, such as boats, is a separate peril from waves. A review of the policy in this case clearly demonstrates that Mutual of Enumclaw treats them as separate perils. In fact, there are three separately defined perils at issue here. This is highlighted by the express provisions of the policy, including Section I “Perils Insured Against” which states:

However, we do cover breakage of the property by or resulting from:...

d. aircraft, vehicles, vandalism and malicious mischief, or volcanic eruption...

f. water not otherwise excluded;

(CP 57.) Based on the policy's express treatment of damage caused by vehicles, vandalism and malicious mischief, and damaged caused by waves as distinct perils, the efficient proximate cause rule should be applied to determine whether there is coverage in this case.

The narrow application of the *Kish* decision is also highlighted by other decisions applying Washington's efficient proximate cause rule. Notably, in *Johnson v. Allstate Ins. Co.*, the United States District Court for the Western District of Washington, determined that damage caused by logs, which were propelled by waves, was not an excluded loss despite the express exclusion for damage "caused by water, waves, earth movement and weather conditions." *Id.* 845 F.Supp.2d 1172, 1176 (W.D. Wash 2012). The court distinguished the case from *Kish*, stating that "Plaintiffs are not simply 'affixing an additional label or separate characterization' to an otherwise excluded peril." *Id.* at 1176. The court held that even though "waves may have propelled logs into Plaintiffs' home [that] does not transform logs and waves into a single undifferentiated peril." *Id.* In the same way, the fact that the operation of boats propelled water into the

property does not transform boat operation and waves into a single undifferentiated peril.

If the court accepts Mutual of Enumclaw's argument that the wakes created by boat operators is the sole cause, then Mutual of Enumclaw improperly denied coverage, because the sole cause of the damage was the operation of boats, which is not an excluded peril. (CP 53-59.)

However, if the boat operation is viewed as a distinct peril from wave damage, then the efficient proximate cause rule applies and creates a genuine issue of material fact that precludes summary judgment. *See Safeco Ins. Co. of Am. v. Hirschmann*, 112 Wn.2d 621, 624, 773 P.2d 413, 414 (1989). As further outlined below, under the efficient proximate cause rule, Mutual of Enumclaw had a duty to cover damage initiated by such boat operation.

Even if Mutual of Enumclaw were to present evidence that natural occurring waves along with wakes from operated boats both contributed to the damage, this would not support a grant of summary judgment. Instead, it would merely create a genuine issue of material fact for the factfinder to determine—that is which cause was the efficient proximate cause of the loss. *See Hirschmann* at 631, 773 P.2d at 417.

**D. Under The Efficient Proximate Cause Rule Damage Caused to Dr. Fernau’s Property is a Covered Loss**

Washington has adopted the efficient proximate cause rule to determine whether coverage exists when there are a series of events that lead to a loss. As outlined above, Dr. Fernau’s all-risk policy did not exclude damaged caused by boats. (CP 53-59.) Furthermore, the policy expressly covers vandalism and malicious mischief. (CP 57.) Dr. Fernau alleges that operation of boats started the sequence of events that caused substantial damage to his dock and home. The wakes are only the second part of that sequence of events. Under recognized public policy, Mutual of Enumclaw cannot rely on an exclusionary clause to circumvent the doctrine of efficient proximate cause. *Xia v. ProBuilders Specialty Insurance Company*, 188 Wn.2d 171, 188 (2017). Dr. Fernau’s claims for damage is a covered loss under the policy.

**1. Washington has Adopted the Efficient Proximate Cause Rule**

The doctrine of efficient proximate cause applies when a “covered peril” sets into motion a chain of causation which leads to an uncovered loss. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 519, 276 P.3d 300, 309 (2012). The “efficient proximate cause rule” was first adopted in Washington in 1983 in the decision of *Graham v. Public*

*Employees Mut. Ins. Co.*, 98 Wn.2d 533, 656 P.2d 1077 (1983). In *Graham*, several homeowners sought recovery under all-risk Homeowner's policies for losses caused by mudflows resulting from the volcanic eruption of Mount St. Helens. *Id.* at 534, 656 P.2d at 1079. The insurers rejected the claim based on a clause that excluded coverage for losses resulting directly or indirectly from earth movement. *Id.* at 535, 656 P.2d at 1079. However, the policy covered damage caused by "explosion...resulting from earth movement." *Id.*

The trial court granted the insurers motion for summary judgment. *Id.* at 535, 656 P.2d at 1079. The Washington Supreme Court reversed the trial court and held that whether movement of Mt. St. Helens was an "explosion" within the terms of the policies, was a factual issue for the jury to determine. *Id.* at 536, 656 P.2d at 1080. The Court also held that the jury was to determine whether earth movements were caused by earthquakes and harmonic tremors which preceded the volcanic eruptions and whether Mt. St. Helens' eruption was the proximate cause of the damage to the insured's homes. *Id.* at 536, 539, 656 P.2d at 1080-1081.

In 1989 the Washington Supreme Court again applied the efficient proximate cause rule stating that "if the initial event, the 'efficient proximate cause,' is a covered peril, then there is coverage under the policy regardless whether subsequent events within the chain, which may be

causes-in-fact of the loss, are excluded by the policy.” *Safeco Ins. Co. of America v. Hirschmann*, 112 Wn. 2d 621, 628, 773 P.2d 413, 416 (1989). In *Hirschman*, several residences built on a hillside were damaged after high wind and heavy rain caused landslides in the area. *Id.* at 623, 773 P.2d at 413-414. In *Hirschman*, the policies stated that they did not “cover loss caused by any of the following perils, whether occurring alone or in any sequence with a covered peril: ... 2. Earth movement, meaning: a. earthquake; *landslide*; mudflow; earth sinking, rising or shifting.... *Safeco Ins. Co. of Am. v. Hirschmann*, 112 Wn.2d at 624, 773 P.2d at 414 (1989).

The trial court granted summary judgment to the insurers determining there was no coverage under the policies. *Id.* at 626, 773 P.2d at 415. The Court of Appeals reversed and directed the case be remanded for factual determinations. *Id.* at 626, 631, 773 P.2d at 415, 418. On further appeal by the insurers, the Washington Supreme Court affirmed the Court of Appeals determination that summary judgment was improper and specifically held that an insurer cannot draft exclusionary language to circumvent the efficient proximate cause Rule. *Id.* at 624, 773 P.2d at 414.

The Supreme Court again analyzed the rule’s application in *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 837 P.2d 1000 (1992). In *McDonald*, the court rejected the insurer’s request to abandon the efficient proximate cause rule, and reiterated that where a “covered

peril” “sets other causes into motion which, in an unbroken sequence produce the result for which recover is sought, the loss is covered even though other events within the chain of causation are excluded from coverage.” *Id.* at 731, 837 P.3d at 1004 (citing *Graham v. Public Employees Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077, 1081 (1983)). However, the Court determined that the efficient proximate cause rule did not apply in *McDonald*, because unlike in the present case, the initiating cause alleged by the Plaintiffs, negligent construction, was expressly excluded by the policy. *McDonald*, 119 Wn.2d at 733-734, 837 P.2d at 1005.

In 2017, the Washington Supreme Court decided the case of *Xia v. ProBuilders Specialty Insurance Company*, stating that “the efficient proximate cause rule remains an important part of Washington insurance law.” 188 Wn.2d 171, 188, 400 P.3d 1234, 1243 (2017). In *Xia*, the Plaintiff alleged that negligent installation of a water heater had caused carbon monoxide exposure resulting in physical harm. *Id.* at 174, 400 P.3d at 1236. Despite the court’s determination that the plain language of the policy clearly excluded coverage for the release of carbon monoxide, the court held that by applying the efficient proximate cause rule, it was clear that the policy did not exclude the alleged initiating cause, the negligent installation, and therefore provided coverage. *Id.* at 185, 400 P.3d at 1241-42. The Court reversed the trial court’s grant of summary judgment to the insurer

and determined that Xia was entitled to judgment as a matter of law with regard to her breach of contract and bad faith claims. *Id.* at 190, 400 P.3d at 1244.

In the present case, Dr. Fernau has alleged that third parties operated their boats in a manner that caused damage to his property. (CP 6; 117 ¶23.) For the purpose of summary judgment Mutual of Enumclaw did not contest the facts alleged by Dr. Fernau. (CP 36; 103.) As previously outlined, Mutual of Enumclaw has not identified an exclusion in the all-risk policy for operation of a boat. (CP 76-80; 85-87.)

As discussed in *Xia*, the efficient proximate cause rule is not limited to any one particular type of insurance, rather it has “broad application whenever a covered occurrence under the policy—whatever that may be—is determined to be the efficient proximate cause of the loss.” *Xia* at 183, 400 P.3d at 1240.

In summary, the efficient proximate cause rule is properly applied after (1) a determination of which single act or event is the efficient proximate cause, and (2) a determination that the efficient proximate cause of the loss is a covered peril. *McDonald*, 119 Wn.2d at 732, 837 P.2d at 1004.

Accordingly, “if the initial event, the ‘efficient proximate cause,’ is a covered peril, then there is coverage under the policy regardless whether

the subsequent events within the chain, which may be causes-in-fact of the loss, are excluded by the policy.” *Safeco Ins. Co. of America v. Hirschmann*, 112 Wn.2d at 628, 773 P.2d at 416.

## **2. The Efficient Proximate Cause Applies to Wakes Created by Operation of Boats**

At summary judgment Mutual of Enumclaw argued that the efficient proximate cause rule does not apply because the policy excludes both water damage and earth movement. (*See generally* CP 34; 41.) Specifically, Mutual of Enumclaw has stated that it does not matter what caused the wakes, because damage caused by waves is excluded. (CP 38-39.) Not only does this ignore Washington Law on efficient proximate cause, Mutual of Enumclaw’s argument is based on an incomplete recitation of the policy language. Paragraph 1 of Section I – Exclusions states:

“We will not pay for loss or damage caused by any of the excluded events below. Loss or damage will be considered to have been caused by an excluded event if the occurrence of that event: (1) directly and solely results in loss or damage; or (2) initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.”

(CP 58.) The quoted policy language effectively recognizes the efficient proximate cause rule. Here, if water damage was the sole cause or was the initiating cause, then the exclusion would apply. However, the evidence

presented at summary judgment is that boat operation initiated the sequence of events. Since boat operation is not excluded and damage caused by wanton or intentional disregard is expressly covered, even if water damage is the resultant loss, it is not excluded under the policy. (CP 53-59.)

**3. The Operation of Boats in a Manner that Started the Chain of Events that Caused Damage to Dr. Fernau's Property is the Efficient Proximate Cause.**

The "efficient proximate cause" of a particular loss is that peril that "sets other causes into motion which, in an unbroken sequence, produce the result for which recovery is sought." *McDonald*, 119 Wn.2d at 731, 837 P.2d at 1004 (*citing Graham*, 98 Wn.2d at 538, 656 P.2d at 1081 (reasoning that the efficient proximate cause "is not necessarily the last act in a chain of events")). Typically, determination of what act or event makes up the efficient proximate cause of a particular loss is a question of fact for the trier of fact. *McDonald*, 119 Wn.2d at 732, 837 P.2d at 1004.

In this case, when bringing its motion for summary judgment, Mutual of Enumclaw did not contest facts alleged by Dr. Fernau. (CP 36; 103.) Dr. Fernau asserted that the operation of boats on the lake was the actual cause of the loss in question. (CP 6.)

The evidence presented at summary judgment instead showed that on the lake abutting Dr. Fernau's Property persons routinely operated their

boats in a way that created excessive wakes up to 5 feet in size. (CP 115 ¶¶9 -11; CP 120 ¶14; CP 133.) It is the actions of these third-party boat operators that set into motion events, “which, in an unbroken sequence, produce[d] the result for which recovery is sought.” *McDonald*, 119 Wn.2d at 731, 837 P.2d at 1004 (*citing Graham*, 98 Wn.2d at 538, 656 P.2d at 1081). The fact that, other causes may be present, such as natural waves caused by wind or otherwise, is not determinative to the question of which act or event is in fact the efficient proximate cause.

Since boat operation is not excluded, and damage caused by intentional acts are expressly covered, when viewing the evidence that such actions initiated the chain of events in a light most favorable to Dr. Fernau, summary judgment is improper. (CP 53-59.)

#### **4. Denying Coverage based on the Exclusionary Clause Violates Public Policy.**

In an attempt to circumvent Washington law, Mutual of Enumclaw has argued that the exclusionary language related to water damage precludes recovery. (CP 126; 143-146.) However, the Washington Supreme Court has expressly stated that an exclusionary clause cannot be used to circumvent the doctrine of efficient proximate cause. *Xia v. Probuilders Specialty Ins. Co.*, 188 Wn.2d 171, 184, 400 P.3d 1234, 1241 (2017), *as modified* (Aug. 16, 2017), *reconsideration denied* (Aug. 17,

2017). This doctrine was adopted by Washington courts to protect insured parties from overbearing exclusionary clauses, and to make sure that clauses “drafted to circumvent the [efficient proximate cause] rule will not defeat recovery.” *Id.* at 184, 400 P.3d at 1241.

In *Xia*, the policy language stated that “this Exclusion applies regardless of the cause.” *Id.* Despite the policy’s clear exclusionary language, the Washington Supreme Court refused to give the language its desired effect due to it being in direct conflict with established Washington law (i.e. the doctrine of efficient proximate cause). *Id.* at 185, 400 P.3d at 1241.

In this case, the exclusionary provision excludes water damage, and defines water damage as:

Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind.

(CP 58 Exclusion b (emphasis added).) Mutual of Enumclaw argued at summary judgment that the language “whether or not driven by wind” applies to the entire provision to include water damage of all kinds, regardless of the cause – even if the cause is a covered one. (CP 143-146.)

There are several issues with Mutual of Enumclaw’s position. Namely, it is unclear what portion of the sentence the clause “whether or not driven by wind” modifies. Based on the sentence structure and comma

placement it appears that “whether or not driven by wind” was intended only to clarify “spray from any of these” and not the remainder of the sentence. As such, the “Water Damage” exclusion is clearly susceptible to two different interpretations. As previously discussed, in applying the efficient proximate cause case law, neither interpretation should bar Dr. Fernau’s claim.

“A policy provision is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.” *Morgan v. Prudential Ins. Co. of America*, 86 Wn. 2d 432, 435, 545 P.2d 1193, 1195 (1976). “[W]here the clause in a policy is ambiguous, a meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning.” *Id.* “Because ‘exclusions from insurance coverage are contrary to the fundamental protective purpose of insurance . . .’” they are strictly construed against the insurer. *Vision One, LLC v. Phila. Indem. Ins. Co.*, 174 Wn. 2d at 512, 276 P.3d at 306 (2012). If “whether or not driven by wind,” only applies to spray, then the exclusion would not apply to the current situation. The ambiguous provision should be interpreted in Dr. Fernau’s favor, entitling him to coverage based on the interpretation that the “whether or not driven by wind” clause only applies to water “spray.”

Regardless of how you interpret the clause “whether or not driven by wind,” Mutual of Enumclaw’s denial of coverage ignores Washington’s efficient proximate cause rule as discussed above. It appears that Mutual of Enumclaw is arguing that it has successfully drafted policy language to exclude water damages, regardless of the initial cause, even where the initial cause is a covered peril. Such an argument is contrary to the holding in *Xia*, and ignores the public policy underlying the efficient proximate cause rule that “[h]aving “received valuable premiums for protection against harm caused by negligence, an insurer may not avoid liability merely because an excluded peril resulted from the initial covered peril.” *Xia*, 188 Wn.2d at 184, 400 P.3d at 1240.

It is important to note that the law does not prevent Mutual of Enumclaw from excluding certain perils, it simply requires an insurer to be clear in what it is excluding. As highlighted in *Xia*, Mutual of Enumclaw could have written specific exclusions to avoid liability for damages caused from particular acts—such as boat operation. *See Xia*, 188 Wn.2d at 189, 400 P.3d at 1243.

In fact, “[i]n evaluating [an] insurer's claim as to meaning of language used, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question.” *See Johnson v. Allstate Ins. Co.*, 845 F. Supp. 2d 1170, 1175

(W.D. Wash. 2012) (citing *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wash.2d 678, 688, 871 P.2d 146, 151 (1994)). In *Johnson*, the court determined that the “Defendant could have excluded damage arising from “water-borne material,” as other insurance companies have done, and such an express exclusion would have ‘put the matter beyond reasonable question.’” *Johnson v. Allstate Ins. Co.*, 845 F. Supp. 2d 1170, 1175 (W.D. Wash. 2012), (citing *Lynott*, 123 Wash.2d at 688, 871 P.2d at 151.)

In the same way, Mutual of Enumclaw could have drafted such an exclusion, then there would not be a question of coverage in this case. In *Xia*, the Court pointed out that an exclusion for acts of negligence related to installation of home fixtures generally or hot water heaters specifically, would have been foreseeable given that the policy was for construction of a new home. *Xia*, 188 Wn.2d at 189, 400 P3d at 1243. In the same way, excluding damage caused by operation of a boat is foreseeable for a policy covering lake front property. However, just as the insurer in *Xia* failed to exclude negligent installation, Mutual of Enumclaw did not exclude damage caused by third party boat operators in the policy that it sold to Dr. Fernau. *See Xia*, 188 Wn.2d at 189, 400 P3d at 1243.

As Mutual of Enumclaw’s policy expressly treats operation of vehicles as distinct perils from water damage, the efficient proximate cause rule applies. As such there is a genuine issue of material fact as to what was

the efficient proximate cause was in this case. This issue cannot be resolved by Mutual of Enumclaw's motion for summary judgment.

## V. ATTORNEY FEES

Dr. Fernau plead a claim under the Insurance Fair Conduct Act and may be entitled to an award of reasonable attorneys' fees and costs pursuant to RCW 48.30.015. In accordance with RAP 18.1(a), Dr. Fernau seeks to preserve his right to be awarded fees. However, because Dr. Fernau is appealing the trial court's dismissal of claims on summary judgment, a request for fees is likely premature until a decision on the merits has been entered by the trial court. *See Hinman v. Yakima School Dist. No. 7*, 69 Wn. App. 445, 452-53, 850 P.2d 536, 540-41 (Div. III 1993) (holding that an award of fees upon appellate reversal of summary judgment could not be determined until after trial on the merits of the plaintiff's WLAD claims); *See also Riehl v. Foodmaker, Inc.*, 152 Wn. 2d 138, 153, 94 P.3d 930, 938 (2004), *abrogated on other grounds* (stating "[w]here a party has succeeded on appeal but has not yet prevailed on the merits, the court should defer to the trial court to award attorney fees.").

Accordingly, if this Court remands this matter for further proceedings on the merits, Dr. Fernau requests that this Court also defer to and direct the trial court to make a determination with regards to an award of fees. *See* RAP 18.1(i) (stating "[t]he appellate court may direct that the

amount of fees and expenses be determined by the trial court after remand.”). Upon final determination on the merits, the trial court may award fees for both trial and appellate costs based on its determination of the prevailing party. *See Riehl*, 152 Wn. 2d at 153, 94 P.3d at 938, *abrogated on other grounds* (stating “[i]f the party prevails on the merits, the trial court may award fees for trial and appellate costs.”).

By including this section on attorney fees and expenses, Dr. Fernau seeks to preserve his right to later request fees pursuant to RCW 48.30.015 or as may otherwise be permitted by law on his reinstated claims.

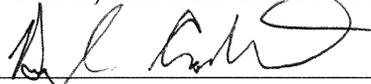
## **VI. CONCLUSION**

Enumclaw issued an all-risk policy to Dr. Fernau for his residence on Newman Lake. The policy does not exclude damage caused by the operation of boats, and affirmatively covers damage cause by intentional acts of third-parties that cause damage to property. Yet, Mutual of Enumclaw argues that its ambiguous exclusionary language should be read to deny coverage caused by the resulting wake. Mutual of Enumclaw’s argument undermines Washington’s “efficient proximate cause” rule. At a minimum, there is a genuine issue of material fact as to whether the operation of boats is the efficient proximate cause of the damage that is separate and distinct from the excluded peril of water damage.

Therefore, Dr. Fernau respectfully asks this Court to reverse the summary judgment dismissal of his breach of contract and Insurance Fair Conduct Act claims and remand this matter to the trial court for a fact finder to determine whether third-party actions are the “efficient proximate cause” of the water damage and thus covered under the Policy.

Dated this 3 day of January, 2020.

**WOLFF, HISLOP & CROCKETT, PLLC**



BRADLEY C. CROCKETT, WSBA #36709  
Attorneys for Plaintiff

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7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**  
8 **IN AND FOR THE COUNTY OF SPOKANE**

9 WALT FERNAU III, an individual,  
10  
11 Appellant,  
12 v.  
13 MUTUAL OF ENUMCLAW INSURANCE  
14 COMPANY, an Oregon Corporation,  
15 Respondent.

Trial Court No.: **18-2-00845-4**  
Court of Appeals No.: 370402

**Declaration of Service**

16 I, BRADLEY C CROCKETT, hereby make the following declaration:

17 1. I am over the age of eighteen and competent to testify in the above-entitled matter  
18 and make this declaration of my own personal knowledge.

19 2. That on January 3, 2020, I caused to be served a true and correct copy of:

- 20 • OPENING BRIEF OF APPELLANT WALTER FERNAU III

21 by the method indicated below, and addressed to the following:

22  
23 Brad Smith  
24 Feltman Ewing  
25 1600 Paulson Center  
26 421 W. Riverside Ave.  
27 Spokane, WA 99201

- VIA HAND DELIVERY  
 VIA U.S. MAIL  
 VIA OVERNIGHT MAIL  
 VIA FACSIMILE  
 VIA E-MAIL

28 I certify and declare under penalty of perjury under the laws of the state of Washington that the  
29 foregoing is true and correct.

30   
31 \_\_\_\_\_  
32 Bradley C. Crockett