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STATE OF WASHINGTON, COURT OF APPEALS  
DIVISION III

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WALTER FERNAU III,

Plaintiff/Appellant,

vs.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Defendant/Respondent.

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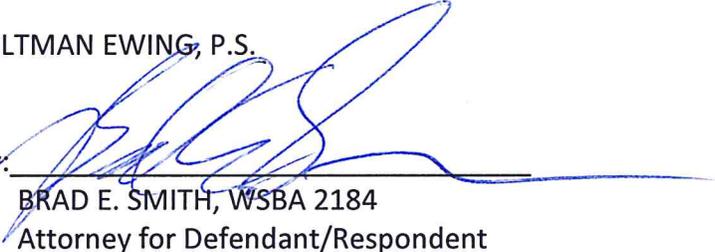
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BRIEF OF RESPONDENT

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FELTMAN EWING, P.S.

By: 

BRAD E. SMITH, WSBA 2184  
Attorney for Defendant/Respondent

421 W. Riverside Avenue, Suite 1600  
Spokane, WA 99201  
(509) 838-6800

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## **I. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR**

### **A. Response.**

1. The trial court correctly granted summary judgment in favor of Mutual of Enumclaw, dismissing Dr. Fernau's breach of contract claim, correctly finding there was no coverage for his loss under his Enumclaw Homeowners Policy.

2. The trial court correctly granted summary judgment in favor of Mutual of Enumclaw, dismissing Dr. Fernau's claim under the Insurance Fair Conduct Act, as Enumclaw had correctly denied coverage under its policy issued to Dr. Fernau.

### **B. Issues Pertaining To Assignment Of Error**

1. Whether the Court correctly dismissed Dr. Fernau's breach of contract claim for wave damage to his Newman Lake property, where his Enumclaw Homeowners Policy clearly and unambiguously excluded property damage caused by waves.

2. Whether the Court correctly granted Enumclaw's motion for summary judgment, dismissing Dr. Fernau's claim under the Insurance Fair Conduct Act, where Washington law provides that an IFCA claim cannot survive where the insurer correctly denied coverage.

## **II. RESPONSE TO APPELLANT'S STATEMENT OF THE CASE**

For purposes of this appeal from the Court's Order Granting Summary Judgment (CP 158-60), Mutual of Enumclaw (hereinafter "Enumclaw") does not dispute Dr. Fernau's factual statement of the case. Enumclaw does, however, want to clarify for the Court the relevant policy provisions at issue which were either incorrectly or insufficiently identified by Dr. Fernau in his brief.

The Enumclaw Homeowners Policy issued to Dr. Fernau provided as follows:

### **SECTION I – PERILS INSURANCE AGAINST**

**We insure** against risks of direct loss to property described in Coverages A, B and C only if that loss is a physical loss to property.

### **EXCLUSION**

However, **we do not insure** loss under Coverages A, B, and C:

...

d. (1) wear and tear, marring, deterioration;

...

(6) settling, shrinking, bulging or expansion, including resultant cracking of pavements, patios, foundations, walls, floors, roofs or ceilings;

...

We do not insure loss under Coverages A and B caused by vandalism and malicious mischief or breakage of glass and safety glazing materials if the dwelling has been vacant for more than 30 consecutive days immediately before the loss.

A dwelling being constructed is not considered vacant.

**We do not insure** loss under Coverage C [personal property] caused by:

1. breakage of:

...

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

...

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

Dr. Fernau quoted policy provision 1.d. above in paragraph 4 of his Statement of the Case, but failed to clarify for the Court that this particular exclusionary language applies only to Coverage C losses, loss to personal property. As Dr. Fernau's complaint does not allege damage to personal property (as opposed to Coverage A—the dwelling), the language cited by Dr. Fernau in paragraph 4 is irrelevant and immaterial.

The **relevant** Enumclaw Homeowners policy language provides as follows:

#### **SECTION 1 – EXCLUSIONS**

1. We will not pay for loss or damage caused by any of the excluded events described 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.

...

b. **Water Damage**, meaning:

- (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

...

2. **We will not pay** for loss or damage to property described in Coverages A and B caused by any of the excluded events described below.

...

a. **Weather Conditions**. A weather condition which results in:

...

- (3) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

...

c. **Faulty, inadequate or defective**:

...

- (2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- (3) materials used in repair, construction, renovation or remodeling; or
- (4) maintenance;

of part or all of any property whether on or off the "residence premises".

### III. LEGAL ARGUMENT

#### A. Standard Of Review

Enumclaw agrees with Dr. Fernau regarding this matter being reviewable *de novo*. Enumclaw also refers the Court to the following standards regarding summary judgment:

The primary purpose of summary judgment is to avoid a useless trial. *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988). An additional purpose of a summary judgment proceeding is to examine the sufficiency of legal claims and to narrow the issues. *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991).

In the absence of any question of material fact, whether a summary judgment is appropriate is a question of law. *Wier v. American Motorists Ins.*, 63 Wn. App. 187, 816 P.2d 1278 (1991).

Summary judgment is appropriate if reasonable persons could reach only one conclusion from all the evidence, together with all the reasonable inferences therefrom, viewed most favorably toward the nonmoving party. *Hansen v. Friend*, 118 Wn.2d 476, 824 P.2d 483 (1992).

In a summary judgment motion the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving

party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If at this point the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 21 265, 106 S. Ct. 2548 (1986); *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Because in this summary judgment appeal Enumclaw is not contesting the facts as alleged by Plaintiff, the Court can rule as a matter of law as to whether those facts support a finding of coverage under Enumclaw’s policy or a finding of bad faith against Enumclaw.<sup>1</sup>

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<sup>1</sup> In its denial of coverage letter to Dr. Fernau, Enumclaw did not solely rely upon the water damage/waves exclusionary language. Enumclaw raised numerous other policy exclusions from coverage such as settling of foundation; cracking of foundations, walls, floors, roofs or ceilings; defective construction, renovation, remodeling or compaction, etc. (CP 76-80). However, as it was Dr. Fernau’s position that the damage to his home was solely caused by the waves created by wake boats on Newman Lake, Enumclaw did not raise these other exclusionary grounds under the policy, but instead focused solely on the waves and the exclusion of waves under the policy’s definition of “water damage.” Consideration of these other exclusionary provisions might well create questions of fact, contested by Dr. Fernau.

**B. Rules Regarding Insurance Policy Construction And Interpretation**

In addition to those citations made by Dr. Fernau in his opening brief regarding insurance policy interpretation,<sup>2</sup> the Court is referred to the following additional tenets of Washington law concerning the interpretation of insurance policies:

(1) The policy will be given a practical and reasonable interpretation that allows its subject and purpose to be fulfilled. *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005).

(2) All of the provisions in the insurance contract shall be reviewed together so that each will have its intended force and effect. *American Star Ins. v. Grice*, 121 Wn.2d 869, 877, 854 P.2d 622 (1993);

(3) A policy will be interpreted in a manner consistent with how it would be understood by the average person purchasing insurance. *Quadrant Corp.*, *supra* at 171;

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<sup>2</sup> Dr. Fernau boldly states, totally without citation, that “general insurance law favors finding coverage.” (Appellant’s Brief, p.12). This is a gross oversimplification of the many rules of interpretation and construction cited by Enumclaw herein. A more succinct statement, to the extent one is required, is that a policy will be given a practical and reasonable interpretation that allows its subject and purpose to be fulfilled. *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005).

(4) Individual words will be interpreted in their plain, ordinary, and popular sense. *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 689, 871 P.2d 146 (1994);

(5) A policy will not be subjected to a strained or forced interpretation that would lead to an absurd conclusion or render the contract nonsensical or ineffective. *Glaubach v. Regents Blue Shield*, 149 Wn.2d 829, 833, 74 P.3d 115 (2003);

(6) Policy interpretation will be based upon a “common sense approach” and not how the insurance contract would be read by a “learned judge or scholar.” *Boeing Co. v. Aetna Cas. & Surety Co.*, 113 Wn.2d 869, 881, 784 P.2d 507 (1990).

Because the language relied upon by Enumclaw to support its denial of coverage is included in an exclusion, special rules apply. An exclusion is ambiguous if it is susceptible to at least two different, reasonable interpretations, one in favor of coverage and one unfavorable. *Weyerhaeuser v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). If the Court determines the policy is ambiguous, which determination can be made as a matter of law, then the insured is entitled to the application of the interpretation which is more favorable to his

interest. *National Union Fire Ins. Co. v. Zuver*, 110 Wn.2d 207, 210, 750 P.2d 1247 (1988). However, in interpreting/construing the exclusionary language of Enumclaw's policy, the Court should be guided by the additional tenets of Washington law on this point:

(1) The Court should enforce exclusions which are defined in plain and explicit language. *Davis v. North American Accident Ins. Co.*, 42 Wn.2d 291, 297, 254 P.2d 722 (1953);

(2) A valid exclusion will not be eviscerated or interpreted so narrowly that its limiting language would be rendered meaningless. *Queen City Farms v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 89, 882 P.2d 703 (1994).

(3) An insured may not avoid an exclusion merely by affixing a specific label or characterization to the act or event causing the loss. *Kish v. Insurance Co. of North American*, 125 Wn.2d 164, 170, 883 P.2d 308 (1994);

(4) An exclusion is not invalid merely because it fails to provide for every possible contingency. *Vohme v. Pemco Mut. Ins. Co.*, 127 Wn.2d 409, 416, 899 P.2d 787 (1995).

(5) The rule of strict construction of exclusions is merely an aid in arriving at the intention of the parties to that policy. It is not intended that

the rule should be applied to overrule the otherwise apparent clear intention of the parties. The intention of the parties to the insurance policies must control concerning the coverage provided. *Aetna Ins. Co. v. Kent*, 85 Wn.2d 942, 946, 540 P.2d 1383 (1975).

(6) Just because a policy provision is “confusing” does not necessarily mean it is ambiguous. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992).

**C. Wave-Induced Damage To Dr. Fernau’s Waterfront Property Is Not Covered Under His Enumclaw Policy**

Throughout this litigation and on appeal, Dr. Fernau has consistently maintained that the damage to his house was caused by excessive waves/wakes on Newman Lake caused by wake boats, which resulted in the erosion of soil around the foundation of his home. CP 6, 94. This specific cause is clearly excluded by Enumclaw’s policy, which states it will not pay for water damage, meaning:

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

This policy language is clear and unambiguous. Waves, from whatever cause (wakeboarding, watercraft, wind, tides) are not covered.

The inclusive and broad nature of this exclusion is also evidenced by the language that waves or tidal water are not covered, “whether or not driven by wind.”

Dr. Fernau’s home is located on Newman Lake, not an ocean or river. Waves are therefore likely to be caused either by wind or watercraft, such as wake boats. The fact that these wake boats might create an excessively large “wave” does not change the clear and unambiguous language of Enumclaw’s policy.

In an insurance policy, individual words such as “waves” should be interpreted in their plain, ordinary, and popular sense. *Lynott, supra* at 689. The policy should be interpreted in a manner consistent with how it would be understood by the average person purchasing insurance. *Quadrant Court, supra* at 171.

Dr. Fernau alleges that his home was damaged by waves emanating from wake boats on Newman Lake. The Enumclaw policy issued to Dr. Fernau clearly and unambiguously excludes waves. To interpret the Enumclaw policy otherwise would be to eviscerate its clear language or so narrowly interpret it as to render the language meaningless. *Queen City Farms, supra* at 89.

Although Dr. Fernau attempts to characterize the waves which damaged his property as “wakes,” the terms are virtually identical. According to *Dictionary.com*, a word related to wake is “wave.” According to *Vocabulary.com*, the primary meaning of wake (as a noun) is “the wave that spreads behind a boat as it moves forward.” To the extent there is any difference between the terms, a “wake” is generally considered as “the track left by a moving body (such as a ship) in a fluid” (*Merriam-Webster*) or “an area of water whose movement has been changed by a boat or ship moving through it.” (*Cambridge Dictionary*). See, Appendix “A.”

**D. Enumclaw’s Policy Clearly Excludes Waves, And Therefore The Efficient Proximate Cause Rule Does Not Apply**

Dr. Fernau’s argument is essentially that coverage is afforded under Enumclaw’s policy because, while it excludes waves, it does not exclude “negligently operated boats.” In examining this novel argument, however, the Court should keep in mind one of the tenets of insurance policy construction/interpretation is that:

A policy will not be subjected to a strained or forced interpretation that would lead to an absurd conclusion or render the contract nonsensical or ineffective.

*Glaubach v. Regence Blue Shield*, 149 Wn.2d 829, 833, 74 P.3d 115 (2003).

Furthermore, a policy will be interpreted in a manner consistent with how it would be understood by the average person purchasing insurance.

*Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005).

The fallacy of Dr. Fernau's argument lies in his futile attempt to categorize the waves as a separate "cause" from the alleged negligent operation of the wake boats. When the Enumclaw policy is given a sensible interpretation, and read as it would be understood by the average person purchasing insurance, this becomes clear.

Initially, the determination of whether perils involve a single, distinct cause or multiple causes is a question of law for the court. *Sunbreaker Condo. Assoc. v. Travelers Ins. Co.*, 79 Wn. App. 368, 901 P.2d 1079 (1995), (The court determines coverage by characterizing the perils contributing to the loss, and determining which perils the policy covers and which it excludes). *Id.* at 374-75. Only where there are multiple perils found, and it is unclear which peril was the "efficient proximate cause," does the question go to the jury as to the determination of the cause. *Sunbreaker*, *supra* at 1085.

It makes no sense to separate as two distinct causes the “negligent or intentional operation of the wake boat” and the waves produced. In both situations, the waves were the intended result. That is the reason why wake boats are made, and the purpose for which they are used. That the Court should determine this to constitute a single cause is evident when examining how other Washington decisions have found a single peril to be the cause, as opposed to multiple causes.

In *Kish v. Insurance Co. of North American*, the Supreme Court was dealing with the question of coverage for flood damage, when the policy clearly excluded floods from covered losses, but did provide coverage for weather conditions. The insured in *Kish* attempted to create a multiple causation situation by arguing that the flood was distinct from “rain-induced flood.” In rejecting the argument of two causes (“rain” and “flood”) and determining that “the average purchaser of insurance would expect that the term ‘flood’ would encompass rain-induced flood,” the court stated:

The efficient proximate cause rule applies only where two or more independent forces operate to cause the loss.... An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss.

*Kish, supra* at 170. After determining that only one cause of damage existed (rain-induced flood), and that was clearly excluded, the efficient proximate cause rule did not apply, and the exclusion barred coverage under the policy. The *Kish* court went on to state that:

Furthermore, the purpose of the efficient proximate cause rule is to provide a “workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer.

*Id.* At 172. Because the average purchaser of insurance would certainly understand that “waves” were excluded whatever their natural causes (i.e., by wind, boats or perhaps tides), it makes no sense under this policy or the application to the facts in this case to create distinct and separate perils. To do so would be to subject the Enumclaw policy to a “strained or forced interpretation” that would lead to an absurd conclusion. *Glaubach, supra*, at 833. Other courts have resisted attempts by insureds to create separate perils where the circumstance would be nonsensical. *Eide v. State Farm Fire & Cas. Co.*, 79 Wn. App. 346, 901 P.2d 1090 (1995), (the damaging landslide, which was excluded under the policy, was not distinct from the “weakened soil” or “heavy rainfall” which contributed to its cause); *Kish, supra*.

The Supreme Court's decision in *Xia v. ProBuilders Specialty Ins. Co.*, 188 Wn.2d 171, 400 P.3d 1234 (2017), cited by Dr. Fernau, does not require a contrary result. In *Xia*, the court found that the negligent installation of a water heater was a distinct peril from the pollution it created (carbon monoxide), which caused Ms. Xia's bodily injuries. Dr. Fernau argues, quite ingeniously, that the "negligently operated wake boat" is similar to the "negligently installed water heater," and therefore the waves produced by the wake boat should be considered a distinct peril, as was the resulting pollution from the water heater in *Xia*.

Unfortunately for Dr. Fernau, the Supreme Court in *Xia* provided the basis for distinguishing these two cases. In *Xia*, the court stated:

It is clear that a polluting occurrence happened when the hot water heater spewed forth toxic levels of carbon monoxide into Xia's home. However, by applying the efficient proximate cause rule, it becomes equally clear that the ProBuilders' policy provided coverage for this loss. The polluting occurrence here happened only after an initial covered occurrence, which was the negligent installation of a hot water heater **that typically does not pollute when used as intended.**

*Xia* at 185. In the instant case, the wake boats in question were designed and intended to produce the waves/wakes which Dr. Fernau alleges were the damage to his home. In other words, the waves were the normal result

of the wake boats “when used as intended.” To the contrary, escaping CO2 gas from a hot water heater was not the intended use of the appliance. It was the unintended result of the negligently installed water heater that supported the *Xia* court finding multiple perils.

The fact that RCW 79A.60.030 prohibits negligent boat operation is irrelevant to this case. Whether the use of the wake boats is characterized as intentional or negligent (both of which are alleged in Dr. Fernau’s memorandum), since the production of large waves/wakes is the normal and intended function of the wakeboards, it is against Washington precedent governing efficient proximate cause cases to separate the waves from the “boat operation,” to create two separate, distinct perils.

Once the Court determines that we are dealing with a single, distinct peril (waves), it simply becomes a matter of insurance policy interpretation. The Enumclaw policy clearly excludes damage caused by waves, from any source (whether or not driven by wind), and so the efficient proximate cause of Dr. Fernau’s alleged damage is an excluded event. There is therefore no coverage for his losses, based on his own allegation that the damage was caused by waves striking his property from the operation of wake boats on Newman Lake.

Because the policy clearly and unambiguously excludes damage caused by waves and Dr. Fernau's alleges that waves caused the damage to his property, this Court should hold that the average purchaser of insurance would understand that wave-produced damage is excluded under the policy and grant summary judgment in favor of Enumclaw.

**E. The Waves Exclusion Is Unambiguous And Applies To Natural And Artificially Caused Waves**

In his brief Dr. Fernau misunderstands Enumclaw's argument below, stating "Enumclaw argued...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." Appellant's Brief, p. 30. What Enumclaw was addressing below was any contention (made by Dr. Fernau in his summary judgment briefing) that the waves exclusion should be limited only to naturally-occurring waves.

Any such forced interpretation of the clause would lead to absurd results. Like the refusal of the Supreme Court in *Kish* to distinguish "rain induced" floods from other floods, there is nothing in the Enumclaw policy that would require the term "waves" to be distinguished into two categories, natural versus man made. Waves can clearly be made by both

natural and artificial means. Whatever the cause, however, damage caused by waves is clearly excluded under Enumclaw's policy, and to require a different result would result in absurd conclusion or render the contract nonsensical.

Any contention that the exclusionary clause concerning "waves" is limited to only natural as opposed to artificial causes was specifically rejected under similar facts in *O'Meara v. American States Ins. Co.*, 148 Ind. App. 563, 268 N.E.2d 109 (1971). In *O'Meara*, the insureds sought coverage under their homeowners policy for alleged damage to their seawall caused by waves or wakes flowing from behind passing motorboats on the adjacent river. American States denied coverage on the basis of a virtually identical exclusion for water damage "caused by...waves...whether driven by wind or not." *Id.* p. 566. After stating it was constrained to "give the words of an insurance policy their popular and ordinary meaning," the *O'Meara* court stated:

In so doing, we are bound to hold that the term "waves" given its popular and ordinary meaning is a generic term which encompasses both those waves which are motivated by **natural** forces and those motivated by **artificial** forces.

*O'Meara, supra* at 567-68 (emphasis in original). It is also noteworthy that the *O'Meara* court, when examining the possible impact of the phrase "whether driven by wind or not," did not argue that it was only intended to address or modify the "spray" part of the exclusion, but applied that language specifically to the term "waves."

The inclusion of the term "tidal water" in Enumclaw's exclusion immediately adjacent to the term "waves" is further evidence that waves of artificial origination are intended to be included within the exclusionary language. Tidal water is certainly something only caused by natural causes, and although not defined, "tidal water" would certainly also include what is considered natural waves being caused by tides at the shore of a large body of water. Such "tidal" waves are customarily caused only by forces of the wind, currents, or lunar impacts, which would therefore make the term "waves" superfluous if it did not include waves generated artificially, such as by boats. As courts interpreting or construing insurance policies are required to construe all of the provisions of an insurance policy so that each will have its intended force and effect, any argument that "waves" in Enumclaw's policy should be limited to naturally caused waves is without merit.

**F. The Wake Boat Operation Does Not Constitute Vandalism Or Malicious Mischief**

Dr. Fernau relies upon the decision of *Bowers v. Farmers Ins. Exchange*, 99 Wn. App. 41, 991 P.2d 734 (2000), in support of his argument that the waves caused by the wake boats on Newman Lake constitute covered “vandalism” or “malicious mischief” under his Enumclaw policy. This reliance is misplaced, and again attempts to impose a “strained or forced interpretation” on very clear and unambiguous policy language excluding “waves” in Enumclaw’s policy.

The vandalism involved in the *Bowers* decision involved a tenant’s intentional abuse/misuse of leased property (i.e., sealing off windows and walls and diverting heat to the basement to facilitate the tenant’s illegal marijuana grow operation), which resulted in a lack of ventilation throughout the house and excessive mold growth that significantly damaged the property. The *Bowers* court found the tenants acted in conscious and intentional disregard of the owner’s property rights, and that malice could be inferred from the tenant’s acts. Based on these

specific findings, the court held that the tenant's acts constituted vandalism and/or malicious mischief.

What is distinguishable about the *Bowers* decision is the finding that the tenants intended to cause the damage to their landlord's property. This is evident not only from the decision in *Bowers*, but also the analysis of *Bowers* by the court in *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 54 P.3d 1266 (2002). In *Graff*, a tenant converted his leased property into the illegal operation of an indoor methamphetamine lab. The *Graff* court followed the *Bowers* decision reasoning, and stated that:

Here, the tenant's indoor methamphetamine lab created harmful vapors and residues that damaged Graff's rental house. The tenant's acts were intentional, in disregard of Graff's property interest, and the resulting damage was almost a certainty. This meets the definition of vandalism.

What distinguishes Dr. Fernau's case from *Bowers* is any finding or reasonable inference that the wake boat operators were acting in "conscious or intentional disregard" of Dr. Fernau's property rights. *Bowers, supra* at 47. It was the finding in *Bowers* that the tenants acted with conscious and intentional disregard for the owner's rights, which allowed malice to be inferred from their acts.

There is no evidence in the record that the wake boat operators knew or should reasonably have understood that the waves they were producing were causing physical damage to the foundation of Dr. Fernau's house (as opposed to waves simply lapping up on his deck or retaining wall) so as to support their conduct as "malicious." To therefore categorize the wake boat operator's acts as "vandalism" or "malicious mischief" is not supported by *Bowers*, strains common sense and would lead to an absurd conclusion under the policy, which clearly and simply excludes damage caused by "waves."

**G. It Was Unnecessary For Enumclaw To Exclude "Boat Operation" Under The Policy**

Dr. Fernau correctly points out that there is no specific exclusion for boat operation in his Enumclaw policy. This argument is irrelevant, as the Enumclaw policy clearly excludes damage caused by "waves." The wake boat operators did not negligently or intentionally ram Dr. Fernau's property with their watercraft. Such a peril would be covered, as it is not otherwise excluded. But waves, the clear and intended function of a wake boat operator, are clearly excluded.

For a similar reason, the case of *Johnson v. Allstate Ins.*, 845 F. Supp. 2d 1170 (W.D. Wash. 2012), does not require a contrary result in this case. In *Johnson*, both parties' experts agreed that the damage to the Johnsons' home was caused by logs in the water, propelled by waves. The Court held the Allstate policy language regarding "waves" did not apply to the loss, as it did not explicitly exclude "water-borne debris." Dr. Fernau is not alleging, however, the waves on Newman Lake propelled anything into his home. The watercraft which allegedly caused the waves did not collide with his home, nor did they cause any particular debris to physically strike the home. Dr. Fernau alleges the waves themselves caused the damage. Since property damage caused by waves is clearly excluded by Enumclaw's policy, the reliance on *Johnson* is without merit.

**H. The Trial Court's Grant Of Summary Judgment Dismissing Dr. Fernau's IFCA Claim Should Be Upheld**

Dr. Fernau also assigns errors to the trial court's dismissal of his claim under the Insurance Fair Conduct Act (hereinafter "IFCA"). However, in his brief the only argument he makes concerning IFCA is his possible entitlement to attorney fees under RCW 48.30.015(3) should he ultimately

prevail on remand (presuming the Court overturns the trial court's grant of summary judgment regarding coverage).

Dr. Fernau completely fails to grasp the issue concerning the trial court's dismissal of his IFCA claim. Enumclaw argued below (CP 42), and the trial court decided (RP 30, CP 159), that Dr. Fernau had not proved a claim under IFCA. IFCA imposes liability only where an insurer "unreasonably denies a claim" for coverage or benefits. RCW 48.30.015(1). Enumclaw relied upon the seminal Washington Supreme Court decision in *Perez-Cristantos v. State Farm Fire & Casualty Co.*, 187 Wn.2d 669, 678-681, 389 P.3d 476 (2017). In *Perez-Cristantos*, the Supreme Court held that in the absence of an unreasonable denial of coverage or benefits, alleged violations of the Fair Claims Settlement regulations could not independently support a claim under IFCA. Therefore, Dr. Fernau's claims of regulatory violations cannot independently support a claim under IFCA in the absence of an unreasonable denial of coverage.

The trial court agreed with Enumclaw below and dismissed Dr. Fernau's IFCA claim as a matter of law upon finding that summary judgment on coverage in Enumclaw's favor was appropriate based upon the "waves" exclusion.

Because Dr. Fernau does not even devote a portion of his brief on the issue of whether Enumclaw wrongfully denied a claim of coverage or benefits so as to constitute an IFCA violation, his assignment of error regarding IFCA must fail and the trial court's dismissal of his IFCA claim must be upheld.<sup>3</sup>

#### **IV. CONCLUSION**

Dr. Fernau seeks insurance coverage for damage to his waterfront home on Newman Lake, alleging specifics such as cracks in walls, ceilings, floors, and window frames and settling in his upper-level floor. Not only are the specific damages excluded under Enumclaw's policy, but the sole cause of the damage alleged by Dr. Fernau, waves from wake boat operations on Newman Lake, is clearly excluded under Enumclaw's policy. Waves, whatever the cause, are not covered.

Neither the efficient proximate cause rule nor any other convoluted argument can overcome the fact that under Enumclaw's policy, damage

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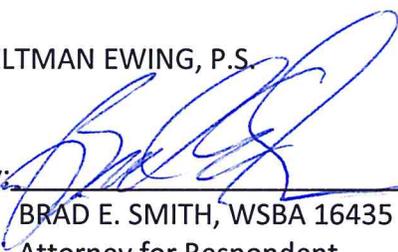
<sup>3</sup> Interestingly, in his brief the sole argument Dr. Fernau raises with respect to IFCA is the allowance to a successful claimant for attorney fees and costs. As attorney fees would be awardable to Dr. Fernau (should the Court reverse Enumclaw's coverage decision) under *Olympic Steamship v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), it appears his IFCA claim was superfluous and properly dismissed.

caused by waves is clearly not covered. Because the production of waves as those complained of by Dr. Fernau is virtually the sole purpose of a wake boat, it makes no sense to separate the wake boat operation and the waves they produced as “separate or distinct perils” to apply the efficient proximate cause.

The Court is respectfully requested to affirm the trial court’s grant of summary judgment in favor of Enumclaw on the grounds that the complained of waves are clearly and unambiguously excluded by Enumclaw’s policy. The trial court’s dismissal of Dr. Fernau’s IFCA claim is mandated by the lack of coverage, and as Enumclaw did not unreasonably deny coverage or benefits under its homeowners policy issued to Dr. Fernau.

DATED this 6<sup>th</sup> day of March 2020.

FELTMAN EWING, P.S.

By:   
BRAD E. SMITH, WSBA 16435  
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 6<sup>th</sup> day of March 2020, a true and correct copy of the foregoing document was served on the following in the manner set forth herein:

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Wolff, Hislop & Crockett, PLLC  
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Spokane Valley, WA 99206

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**APPENDIX "A"**  
**Dictionary Definition**

**wake**<sup>1</sup> [ weyk ] SHOW IPA

SEE SYNONYMS FOR *wake* ON THESAURUS.COM

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*verb (used without object), waked or woke, waked or wok·en, wak·ing.*

to become roused from sleep; awake; awaken; waken (often followed by *up*).

to become roused from a tranquil or inactive state; awaken; waken:  
*to wake from one's daydreams.*

[SEE MORE](#)

*verb (used with object), waked or woke, waked or wok·en, wak·ing.*

to rouse from sleep; awake; awaken; waken (often followed by *up*):  
*Don't wake me for breakfast. Wake me up at six o'clock.*

to rouse from lethargy, apathy, ignorance, etc. (often followed by *up*):  
*The tragedy woke us up to the need for safety precautions.*

[SEE MORE](#)

*noun*

a watching, or a watch kept, especially for some solemn or ceremonial purpose.

a watch or vigil by the body of a dead person before burial, sometimes accompanied by feasting or merrymaking.

[SEE MORE](#)

## QUIZZES

### IT'S ROUND TWO OF OUR A.C.T. VOCABULARY QUIZ!

Prepare for the A.C.T. with this quiz featuring real words from the test!

#### QUESTION 1 OF 10

allay

to put (fear, doubt, suspicion, anger, etc.) to rest; calm; quiet.

a quick, sudden attack.

to move or proceed, especially to or from something.

## TAKE THE QUIZ TO FIND OUT

### WORDS RELATED TO WAKE

aftermath, wave, vigil, watch, deathwatch, track, wash, train, backwash, path, furrow, obsequies

### WORDS NEARBY WAKE

waka, wakamatsu, wakame, wakashan, wakayama, **wake**, wake island, wake-robin, wake-up, wake-up call, wakeboarding

### ORIGIN OF WAKE<sup>1</sup>

before 900; (v.) in sense “to become awake” continuing Middle English *waken*, Old English *\*wacan* (found only in past tense *wōc* and the compounds *onwacan*, *āwacan* to become awake; see *awake* (v.)); in sense “to be awake” continuing Middle English *waken*, Old English *wacian* (cognate with Old Frisian *wakia*, Old Saxon *wakōn*, Old Norse *vaka*, Gothic *wakan*); in sense “to rouse from sleep” continuing Middle English *waken*, replacing Middle English *wecchen*, Old English *weccan*, probably altered by association with the other senses and with the *k* of Old Norse *vaka*; (noun) Middle English: state of wakefulness, vigil (late Middle English: vigil over a dead body), probably continuing Old English *\*wacu* (found only in *nihtwacu* night-watch); all ultimately < Germanic *\*wak-* be lively; akin to watch, vegetable, vigil



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wake



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# wake

[verb](#)

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\ 'wāk \

wokē\ 'wōk \ also waked\ wākt \; woken\ 'wō-kən \ or waked also woke; waking

## Definition of *wake*

(Entry 1 of 3)

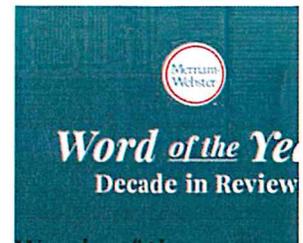
[intransitive verb](#)

1a : to be or remain awake

b archaic : to remain awake on watch especially over a corpse

c obsolete : to stay up late in revelry

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Words of the Year: A Decade in Review

2 : [awake](#), [wake up](#) They woke early.

#### [transitive verb](#)

1 : to stand watch over (someone or something) especially : to hold a wake over

2a : to rouse from or as if from sleep : [awake](#), [wake up](#) Something woke her in the middle of the night.

b : [stir](#), [excite](#) an experience that woke old feelings

c : to arouse conscious interest in : [alert](#) —usually used with *towoke* the public to the risks

wake

#### [noun \(1\)](#)

Definition of *wake* (Entry 2 of 3)

1 : the state of being awake

2a(1) : an annual English parish festival formerly held in commemoration of the church's patron saint

(2) : [vigil sense 3a](#)

b : the festivities originally connected with the wake of an English parish church —usually used in plural but singular or plural in construction

c British : an annual holiday or vacation —usually used in plural but singular or plural in construction

3 : a watch held over the body of a dead person prior to burial and sometimes accompanied by festivity

wake

#### [noun \(2\)](#)

Definition of *wake* (Entry 3 of 3)

1 : the track left by a moving body (such as a ship) in a fluid (such as water) broadly : a track or path left

2 : [aftermath sense 3](#)

in the wake of

1 : close behind and in the same path of travel missionaries arrived *in the wake of* conquistadors and soldiers— Sabine MacCormack

2 : as a result of : as a consequence of power vacuums left *in the wake of* the second world war— A. M. Schlesinger *born* 1917

[Other Words from wake](#) [Synonyms & Antonyms](#) [More Example Sentences](#) [Learn More about wake](#)

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## Other Words from *wake*

Verb

waker noun

## Synonyms & Antonyms for *wake*

Synonyms: Verb

- [arouse](#),
- [awake](#),
- [awaken](#),
- [knock up](#)
- [British],
- [rouse](#),
- [waken](#)

Antonyms: Verb

- [lull](#)

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## Examples of *wake* in a Sentence

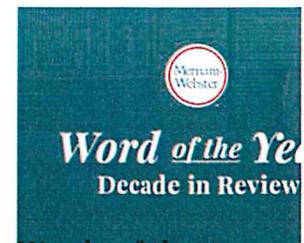
Verb She can never remember her dreams upon *waking*. my banging around in the kitchen *woke* my wife

## First Known Use of *wake*

Verb

before the 12th century, in the meaning defined at [intransitive sense 1a](#)

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Words of the  
Year: A Decade in  
Review

# wake

In the **wake**, or aftermath, of a death, it's traditional in many cultures to hold a *wake*, a vigil for the dead. There's a third meaning of *wake*, too, you know: it's the waves that a boat leaves behind as it slices through the water. And that's not all...

*Wake* has three meanings as a noun, and, yes, just about as many meanings as a verb! So get set. To wake is come out of sleep, a verb you'll recognize from "*Wake up!* You're asleep at the wheel!" You can wake feelings, as well as the people who are having them. The wake before the funeral caused Mike to wake from his depression and decide to live life to the fullest. His first act was to water ski; he eventually mastered staying upright while crossing the wake of the boat that was towing him.

## Primary Meanings of

### wake

1. *v* stop sleeping
2. *n* the wave that spreads behind a boat as it moves forward
3. *n* a vigil held over a corpse the night before burial

## Full Definitions of

### wake

1.

*v* stop sleeping

*"She woke up to the sound of the alarm clock"*

Synonyms: [arouse](#), [awake](#), [awaken](#), [come alive](#), [wake up](#), [waken](#)

Antonyms: [doze off](#), [doze off](#), [drift off](#), [drop off](#), [drowse off](#), [fall asleep](#), [flake out](#), [nod off](#)

change from a waking to a sleeping state

Type of: [change state](#), [turn](#)

undergo a transformation or a change of position or action

*v* be awake, be alert, be there

Antonyms: [catch some Z's](#), [kip](#), [log Z's](#), [sleep](#), [slumber](#)  
be asleep

Types: [sit up](#), [stay up](#)  
not go to bed

*v* cause to become awake or conscious

*"Please wake me at 6 AM."*

## Word Family

wake

waking

woke

the "wake" family

## Usage Examples

It's called the power of positive thinking and I think America needs to **wake up** to that.

*Salon* Mar 5, 2020

Cusic said that in the **wake** of mass shootings, some country artists changed their tune about teaming up with the NRA - privately and more publicly.

*Washington Times* Mar 5, 2020

In the **wake** of that rejection Donovan met with Warren Smith, a former minor league baseball executive who became instrumental in founding the Sacramento Republic and taking it a USL title in its first season.

*Los Angeles Times* Mar 5, 2020

She was too **woke** to worry about actual people.

*Fox News* Mar 5, 2020



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PUNTA CANA

Meaning of **wake** in English

# wake

verb [I/T]

US /weɪk/

past tense **woke** US /wʊk/ waked US /weɪkt/ | past participle **woken** US /'wʊkən/ waked**wake** verb [I/T] (STOP SLEEPING)

to become awake and conscious after sleeping, or to cause someone to stop sleeping:

- [I] *Did you wake at all during the night?*
- [T] *The noise of the storm woke the kids.*

Want to learn more?



Improve your vocabulary with **English Vocabulary in Use** from Cambridge.  
Learn the words you need to communicate with confidence.

## waken

verb [I/T] US /'weɪ.kən/

- [T] *He tried to waken her, but she didn't stir.*

### Idiom

wake up to something

### Phrasal verbs

wake up (someone)wake up (someone)

# wake

noun [C]

US /weɪk/



- fig. *The storm left a massive amount of destruction in its wake.*

wake *noun* [C] (GATHERING)



a gathering held before a dead person is buried, at which family and friends talk about the person's life



**CROSS IT OFF YOUR  
BUCKET LIST!**

*...  
points*

**PUNTA CANA**

**BOOK NOW**

(Definition of wake from the [Cambridge Academic Content Dictionary](#) © Cambridge University Press)

wake | ENGLISH

# wake

*verb* [I or T]

UK /weɪk/ US /weɪk/

past tense **woke** or **waked** | past participle **woken** or **waked** (also **wake up**)



**A1**

to (cause someone to) become awake and conscious after sleeping:

- *Did you wake at all during the night?*
- *Please wake me early tomorrow.*
- *I woke **up** with a headache.*
- *Jane's hand on my shoulder woke me **out of/from** a bad dream.*

**Synonyms**

awake literary

awaken literary

bestir yourself formal or humorous

rouse

**See also**

wake (sb) up (STOP SLEEPING)

**— More examples**

- *You won't wake him - he's such a heavy sleeper.*
- *We woke at dawn.*

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### Grammar

Wake, wake up or awaken?

*Wake and wake up are verbs which mean 'stop sleeping or end someone else's sleep'. They are used in everyday language. ...*

### Idioms

wake up!

wake up and smell the coffee

### Phrasal verbs

wake (sb) up

wake up to sth



# wake

noun [ C ]

UK /weɪk/ US /weɪk/

---

wake noun [ C ] (WATER)



the waves that a moving ship or object leaves behind:

- *The wake spread out in a v-shape behind the ship.*



\_laurent/E+/GettyImages

+ More examples

+ Thesaurus: synonyms and related words

---

wake noun [ C ] (FUNERAL)



an occasion when the family and friends of a dead person meet in order to look at the dead body the night before it is buried, or when they meet after a dead person has been buried to drink and talk about the person's

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**FELTMAN EWING, P.S.**

**March 06, 2020 - 4:00 PM**

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**Appellate Court Case Title:** Walt Fernau, III v. Mutual of Enumclaw Insurance Company  
**Superior Court Case Number:** 18-2-00845-4

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