

NO. 65618-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JERRY L. LLOYD,

Appellant.

v.

ALLSTATE INS. CO. & DEERBROOKS INS. CO.,

Respondents.

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
JL

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I. INTRODUCTION

This appeal arises from a policy of insurance sold by Deerbrook Insurance Company, a subsidiary of Allstate, to the Plaintiff Jerry Lloyd. On August 18, 2008, Mr. Lloyd suffered a covered loss under the policy when his vehicle was damaged. Initial evaluations on the loss done by Allstate, who was administering the policy for Deerbrook, determined the value to be \$8,325, but Allstate's adjuster only offered \$5,100. Later, the adjuster revised his evaluation to \$7,100, but only offered \$6,600. After which, the plaintiff hired counsel and eventually invoked the appraisal clause.

Allstate hired an independent appraiser who evaluated the loss between \$6,183 to \$8,083.79. Before the final process took place, Allstate made no offer, nor did they ever offer the \$7,100 or tell Mr. Lloyd or his counsel that they had reevaluated it to be that amount. Subsequently, before there was a final third appraiser, umpire to determine the amounts, Mr. Lloyd's appraiser met with Allstate/Deerbrook's appraiser and they agreed the amount to be paid was \$6,683.70 plus taxes and license fees. However, Allstate deducted \$500 from that amount.

Plaintiff brought a bad faith suit, Consumer Protection Act Claims, and breach of contract, and the court granted summary judgment to defendant and the plaintiff timely appealed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. The Trial Court erred by granting the defendants Motion for Summary Judgment when there was some evidence to support plaintiff's claims for bad faith, consumer protection, and breach of contract.
- B. The Trial Court erred by granting the defendants Motion for Summary Judgment because there was some evidence to find that plaintiff had suffered a loss.

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

The case arose out of a motor vehicle collision that occurred on August 18, 2010. Plaintiff Jerry Lloyd had an insurance policy with the defendant Deerbrook covering his Chevy Malibu. CP 198-99. Deerbrook is a subsidiary of Allstate, while Allstate administered the policy and adjusted and handled the claim for loss. *Id.* After a dispute over the loss arose, plaintiff invoked the

appraisal clause, and obtained an award of \$6,683.70, which was never fully paid. CP 203-206.

Subsequently, the plaintiff filed suit on March 6, 2009 alleging that Allstate had violated Washington's bad faith laws and Consumer Protection Act. CP 1-6. Subsequently, on the 16th of June, 2009, Plaintiff filed an Amended Complaint adding Deerbrook and making claims of Bad Faith and Consumer Protection Act violations against Deerbrook and Allstate. CP 7-11.

After some discovery, the Defendant File a Motion for Summary Judgment. CP 18-37. They gave notice of a hearing for May 20, 2010, and the plaintiff timely filed its response. CP 40-41; CP 178-188; 189-291. The hearing was held on May 20, 2010, and the court granted the defendant's Motion. RP. 33. The plaintiff filed a Motion for Reconsideration, and timely filed an appeal. CP 295-301; CP 304-307.

B. SUMMARY OF THE FACTS

Deerbrook Insurance Company, a subsidiary of Allstate, sold a policy of insurance to the plaintiff Jerry Lloyd promising to repair or replace his vehicle if damaged. On August 18, 2008, Mr. Lloyd's Malibu was damaged in a wreck. Allstate & Deerbrook

learned of the wreck, and Steven Graham was assigned to be the adjuster. CP 189-90; CP 198. An Allstate field tech went to view the car and determine its value and the amount of damages to the car. CP 198-99. That field tech who actually viewed the car determined the value was \$8,325. CP 263-272. The report noted several items about the car. First, that its interior were in Good Condition. *Id.* That its Exterior was in good condition, and that the Engine was Well Maintained, and the tires were good. *Id.*

However, when Allstate's adjuster Graham got the report, instead of offering that to Mr. Lloyd, he immediately adjusted the amount down from \$8,325 to \$5,100. *Id.* at 199. This was done despite the fact that the lowest comparable sales shown on the report were all over \$8,000, and some were near \$10,000. CP 263-269. Mr. Graham then contacted Lloyd and offered him \$5,100. CP 200. Mr. Lloyd, naturally, turned that down. *Id.* A few days later, Mr. Graham redid his evaluations to 7100. CP 201. However, Mr. Graham never ever offered 7100 or told Mr. Lloyd that. *Id.* Instead, he called Mr. Lloyd and offered him only \$6,600. *Id.* Mr. Graham claims that Lloyd said he was contacting a lawyer and hung up. CP 202.

A few days later, Mr. Lloyd hired a lawyer, Alana Bullis. *Id.* Mr. Graham still never offered that amount to anyone, not Mr. Lloyd, not his attorney, or anyone and he did not inform them that Lloyd invoked the appraisal clause and incurred the expense of an appraiser. *CP 202-203.* Likewise, Allstate & Deerbrook hired an independent appraiser, Mr. Mark Olson of future Forensics. *CP 204.* Mr. Olson did a report that showed comparable sales to be \$8,083.79. *Id.* Exhibit 1 attached to Deposition. He determined the value of \$6,183.79. However, that amount was not tendered or offered to the plaintiff either. Even though Graham knew that the minimum amount that would be owed was \$6200, he did not offer it or pay it. *CP 204.*

Before the appraisal went before the umpire, the appraisers for both Allstate and Mr. Lloyd met and agreed on an Appraisal Award, not the actual cash value of the car. *CP 204*(Reference Exhibit 2 to Deposition). They “having completed the appraisal process, hereby render an Award of the Loss in the amount of \$6,683.70 plus sales tax and lis. Fee.” *Id.* Instead of paying that amount, Allstate & Deerbrook deducted 500 and deducted what it deemed to be salvage value of the car. *CP 205-206.* The agreed

award did not agree as to actual cash value, so Allstate & Deerbrook did not follow the award. *Id.*

In his deposition, Mr. Graham admitted that the first report issued by the field tech would have adjusted the amount they had to pay to be around 9,000. CP 208. He also admitted that he adjusted it down to \$5,100. *Id.* Thus, he took the value down by nearly half. *Id.* That was in spite of the fact that the car was in good condition and had regular oil change, and was well maintained. *Id.* He also admitted that there were no sales found for comparable vehicles in the amount of \$5,100. CP 209.

Mr. Graham also admitted that he did not take into account that Mr. Lloyd had regular oil changes, or the good condition of the car. CP 211-213. In fact, he did not discuss this with Mr. Lloyd in any of his phone calls. *Id.* Ironically, Mr. Graham claimed he relied on the field techs review of the vehicle to determine its condition, not any records the plaintiff may have had. *Id.* However, he struck the field techs evaluation from 8350 (before taxes and license fee) to 5100, with taxes and license fee. *Id.*

At the hearing, the defendant's counsel disputed some of the above facts, and he claimed that because Lloyd said he was hiring an attorney they could not have offered or told him of the

evaluation after that. RP 24-28. They cited Washington Administrative Code 284-30-330(19) which prohibits an insurance company of directly negotiating or settling a claim with some known to be represented by an attorney. RP 28. Counsel for plaintiff pointed that they still could have told the plaintiff's lawyer or offered it to them. RP 20. Nonetheless, the court granted summary judgment. RP 33.

IV. ARGUMENT

A. The court erred in granting summary judgment because there was some evidence sufficient to submit to a jury that the defendant had breached its duty of good faith and fair dealing.

The Appellant will not bore the court to sleep with a long rendition of the standards of summary judgment. It is clear law in Washington that a motion for summary judgment should be denied if reasonable minds could differ. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wash. 2d 255, 616 P.2d 644 (1980). Of course, the defendant presented his claims that their actions and offers were reasonable. That may be the case, but the plaintiff, appellant,

has presented what they believe to be their case and what they believe the evidence could show. Thus, the question turns on whether the plaintiff submitted some evidence to support their claims for bad faith and for violations of the Consumer Protection Act.

The Washington Supreme Court has explained the duty an insurance company owes as follows:

The duty to act in good faith or liability for acting in bad faith generally refers to the same obligation. *Tyler v. Grange Ins. Ass'n*, **3 Wn. App. 167, 173, 473 P.2d 193** (1970). Indeed, we have used those terms interchangeably. See *Murray v. Mossman*, **56 Wn.2d 909, 355 P.2d 985** (1960). However, regardless of whether a good faith duty in the realm of insurance is cast in the affirmative or the negative, the source of the duty is the same. That source is the fiduciary relationship existing between the insurer and insured. Such a relationship exists not only as a result of the contract between insurer and insured, but because of the high stakes involved for both parties to an insurance contract and the elevated

level of trust underlying insured's' dependence on their insurers. This fiduciary relationship, as the basis of an insurer's duty of good faith, implies more than the "honesty and lawfulness of purpose" which comprises a standard definition of good faith. It implies "a broad obligation of fair dealing", *Tyler*, at 173, and a responsibility to give "equal consideration" to the insured's interests. *Tyler*, at 177. Thus, an insurance company's duty of good faith rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholders: an insurer must deal fairly with an insured, giving equal consideration *in all matters* to the insured's interests.

Tank v. State Farm, 105 Wn 381, 385-386, 715 P.2d 1133 (1986).

Insurance companies have a high standard to follow, and the question here is there any evidence that they breached it. By their own testimony, the defendant eventually had evaluated the claim at \$7,100, but never made that offer nor informed the plaintiff or the plaintiff's attorney that he had evaluated it to be worth that much. CP 201-204. Thus, the defendant by its own admission never made that offer. They claimed that they could not make that

offer because the plaintiff informed them that they had a lawyer, but they could have always tendered that offer to the lawyer.

Likewise, the defendant/appellee reliance on WAC 248-30-330 is unwarranted. It prohibits:

(19) Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent. This does not prohibit routine inquiries to a first party claimant to identify the claimant or to obtain details concerning the claim.

WAC 248-30-330. It doesn't prohibit making reasonable offers to someone through their counsel. Indeed, if the offer had been made, the plaintiff's counsel could have contacted both plaintiff and his appraiser and advised him whether he should take the amount or not, and we might not be before the court today.

In fact, since they would not offer the final appraisal it could lead to the conclusion Allstate and Deerbrook were being vindictive because the plaintiff would not take their offer of \$5100 and then \$6,600, and he said he was going to hire a lawyer, they were not going to offer their \$7,100 evaluation. This is not acting a fiduciary. Being vindictive is not allowed in such a relationship. "A fiduciary is required to act for the benefit of another person on all matters

within the scope of their relationship . . . who must exercise a high standard of care in managing another's money or property." *Cooke v. Brateng*, 158 Wn. App. 777, 792 (2010). Put another way, a fiduciary has to treat another's claim as if it were their own, if not even better. A fiduciary can never ever be vindictive, but here there is evidence that a jury could conclude that they were. They have also claimed that they did not make that offer because the plaintiff invoked the appraisal clause, but they could have made that offer even then. There is nothing that requires that the appraisal go forward once the clause is invoked, nor does that end their duty to act in good faith.

There are several other reasons that show some evidence that the defendant was not acting in good faith. First, the fact that the initial evaluation done by the field tech was around 9,000 but that jumped down to \$5,100 as soon as Allstate's adjuster Graham got a hold of it and made an offer. CP 207-211. Allstate and Deerbrook have claimed that the reason for the drop was because Graham adjusted the figure down for high mileage. RP 19-24. Nevertheless, that offer was well below the evaluation of Allstate's independent appraiser from \$6,183.79 to \$8,083.79. CP 204.

The law clearly requires that an insurance company is required to promptly provide a reasonable basis for its offer and facts that support its offer. WAC 248-30-330 (13). But the

evidence here support that they were not doing that because they reduced the amount to \$5,100. At that point they had breached the trust with the claimant, Mr. Lloyd. Later, Mr. Lloyd may have gotten what his vehicle was worth in the appraisal process, but not until they had pushed him to it. Since the initial offer was so low, he had no reason to trust them after that, and had they offered their evaluation of \$7,100, Mr. Lloyd could have discussed that with his appraiser and avoided this whole process, but they did not give him that chance.

The defendant argued that the case of *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 915 P. 2d 1140 (1996), showed that the court should grant summary judgment. In that case, the Keller's obtained a personal injury verdict well above *Allstate's* offer. *Id.* at 630-33. The court correctly ruled that fact alone did not mean that *Allstate* acted in bad faith. *Id.* However, the *Keller* case sets out that a defendant's basis for denial has to be reasonable. *Id.* at 634. Here, we don't have any reasonable reason for Allstate not offering \$7,100, nor subsequently tendering or offering at least \$6,200 when an independent adjuster hired by them determined that to be the minimum they owed.

The later fact also shows just how unreasonable the first offer of \$5,100 was. *Keller* clearly establishes that an insurer has a reasonable justification for its offer. *Id.* at 635-36. Here, we are

not talking about a personal injury soft tissue claim like there was in *Keller*. This involves property damage and the value of a vehicle. Only one person, Allstate's adjuster Graham, put a price tag on the loss at \$5,100, and that was after field tech determined it was higher, and two subsequent evaluations found it much higher. They claim it was adjusted down for high mileage, but Mr. Graham did not take into account the good condition of the vehicle, nor the regular document oil changes, and that it was well maintained. CP 208. Thus, there is no reasonable basis to support Allstate's actions, and it was error for the trial court to grant summary judgment in favor of defendants.

B. Allstate and Deerbrook also failed to abide by the appraisal award, and thus it was error for the court to grant summary judgment.

In this case, when it ultimately went through the appraisal process, the two appraiser filled out an appraisal award. Deposition Graham Exhibit 2. The amount of the "Award" was \$6,683.70 plus tax and license fee, which ironically would have been around \$7,100. However, Allstate and Deerbrook deducted from the award \$500 from the award claiming it was the deductible and then again for the salvage value. In fact, they claimed the appraisal award was "the actual cash value" when the appraisal

award did not say that's what the two appraiser agreed upon. If there appraiser had agreed that the "Actual cash value" was \$6,683.70, then Allstate's actions in deducting \$500 would be warranted. However, Allstate's authorized representative Mr. Olson agreed that Mr. Lloyd was to be awarded \$6,683.70 plus taxes licenses fees. Thus, Allstate has even breeched the appraisal clause by not paying the award. In fact, the plaintiff should have received summary judgment.

The case law is clear, parties going through the appraisal process are bound by the results. *i.e. Bainter v. United Pacific Ins.*, 50 Wn. App. 242, 748 P.2d 260, (1988) (holding that an appraisal award was conclusive). Here after the process, both appraisers said the amount to pay, not the actual cash value, was \$6,683.70 plus license fee and tax. Here, Allstate and Deerbrook did not do so. Thus, they breached the policy, there was no reasonable basis to do so, and they have violated both bad faith laws and the CPA as a matter of law.

C. The trial court also erred in granting the summary judgment because there was some evidence of damages submitted by Plaintiff.

Washington law is clear, since at least 1986, with the enactment of RCW 4.56.250(1)(a), which defines “economic damages,” loss of use of property has been a *statutorily* authorized element of recoverable damages. However, the common law of Washington recognized loss of use as an element of recoverable damages long before the enactment of RCW 4.56.250. See, *Holmes v. Roffo*, 60 Wn.2d 421, 324 P.2d 536 (1962) (approving damages for loss of use of an automobile) and the cases cited below. This element of damages is now also included in the Washington Pattern Jury Instructions – WPI 30.16 (5th Ed.) – which reads as follows:

Reasonable compensation for any loss
of use of any damaged property during
the time reasonably required for its
[repair][replacement].

In *Straka Trucking v. Estate of Peterson*, 98 Wn. App. 209 (1999), it was held that when property is totally destroyed, the owner can recover damages for loss of use (including loss of income/profit related to the same) from the date the loss to the date on which the defendant tenders the full value of the claim, the Court stating:

Neither party disputes that Peterson owed Straka a duty of reasonable care, and that Peterson breached that duty when she crossed the center line. Neither party disputes that Peterson's breach of duty proximately caused the destruction of the truck. Neither party has shown that Straka had the means to replace the truck before Peterson paid for it, or that in the exercise of reasonable care he should have replaced the truck earlier than he did.

Neither party has shown that Straka did not lose income that the truck otherwise would have produced.

Modern authorities confirm our application of these general tort principles. A well known text summarizes as follows:

In general, the plaintiff can almost always recover some measure of damages for a reasonable period of lost use. Loss of use claims are appropriate

in the case of private chattels, such as the family car or the pleasure boat.

They are also appropriate in the case of commercial animals and equipment of all kinds...

Loss of use may be measured by (1) lost profit, (2) cost of renting a substitute chattel, (3) rental value of the plaintiff's own chattel, or (4) interest.

Moreover:

The owner who uses a chattel in the production of income is always entitled to claim profits lost when the chattel is unavailable during a reasonable period for repair or *replacement* as a result of tortious *destruction*, damage or conversion. The claim may be that inability to use the chattel reduced the plaintiff's income or that it increased his expense, either way reducing his

net profit, which is recoverable if the proof is adequate.

In *Straka*, however, the court appropriately pointed out that what *McCurdy* truly stands for is the proposition that loss of use may be recovered until payment of the destroyed property is made, but not thereafter, noting in footnote 17 (p. 213 of the opinion) that:

This seems to make sense, at least for the typical case. Once paid, the owner of totally destroyed property can replace it quickly. Once paid, the owner of merely damaged property still needs additional time within which to affect repairs.

The *Straka* court then went on to state that: In this case, we are concerned with loss of use *before* the tortfeasor pays, or, in alternative terms, with loss of use from the date of the accident to the date on which the tortfeasor pays (or tenders) the full value of the destroyed property.

...

Straka, supra, at 98 Wn. App. 212-214.

Here, the defendant's duty was to pay the plaintiff for his loss. Although unlike a wreck, the loss started after the wreck when the defendant failed to pay the claim in full. Thus, Plaintiff has a loss of use claim starting some period shortly after the wreck when the Trier of fact deems that Allstate & Deerbrook should have paid the claim in full. This continues until defendant pays in full for the loss. *Holmes v. Roffo*, 60 Wn.2d 421, 324 P.2d 536 (1962). If we assume that the only damages owed are the \$500 deducted from the award, then defendant still owes for loss of use under the CPA, IFCA and Breach of Contract, because Washington law is clear. You have to pay until the full loss is paid. Since Allstate and Deerbrook have never paid the full amount of the Appraisal award, Mr. Lloyds still has a continuing loss of use claim.

D. There is evidence that supports a CPA violation and for damages.

As stated, the defendant has refused to pay the appraisal award. As result, there is evidence that supports that defendant did not comply with WAC 284-30-330(6). Damage resulted because under the law, Mr. Lloyd had a loss of use claim for

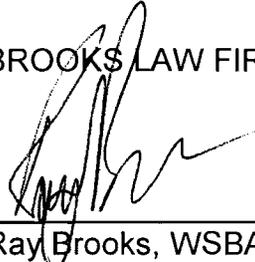
defendants actions. Accordingly, there is enough evidence for a jury to consider Mr. Lloyds claim.

Under the CPA, the plaintiff is entitled to damages even if the damages are minimal. *Griffin v. Allstate Ins. Co.*, 108 Wn.App. 133 (2001); *Mason v. Mortgage America, Inc.*, 114 Wn. 2d 842 (1990). In this case, plaintiff has at least being denied the vehicle, and having to submit to Appraisal clause, if nothing else. Economic harm, even slight, are sufficient as well. *Id.* Here, plaintiff had to pay for repairs himself and was without the funds for some time. A jury certainly could conclude he is owed something for that, beyond anything that the Appraisal award gave.

V. CONCLUSION

This Trial Court erred in granting summary judgment, and the Court of Appeals should remand this matter for trial because there is some evidence that supports a claim for bad faith and violations of the CPA.

RESPECTFULLY SUBMITTED this 28th day of February,
2011.

BROOKS LAW FIRM


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CERTIFICATE OF SERVICE

I certify that I served, or caused to be served, a copy of the
foregoing BRIEF OF APPELLANT on the 28th day of February,
2010, to the following counsel of record at the following address:

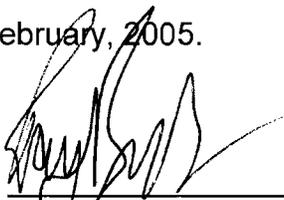
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Via Hand Delivery

DATED this 28th day of February, 2005.



Ray Brooks