

NO. 65618-0-I

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

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JERRY LLOYD, individually,

Appellant,

vs.

ALLSTATE INSURANCE COMPANY, a foreign insurer; DEERBROOK  
INSURANCE COMPANY, a foreign insurer,

Respondents.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Wesley Saint Clair, Judge

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BRIEF OF RESPONDENTS

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## **I. NATURE OF THE CASE**

Appellant Jerry Lloyd owned a vehicle that was rendered a “total loss” following an August 18, 2008 accident. Deerbrook Ins. Co. insured Mr. Lloyd and its parent company, Allstate Ins. Co., handled the claim.

Mr. Lloyd and Allstate were unable to agree on the vehicle’s value. Mr. Lloyd rejected Allstate’s first offer on September 9, 2008. After conducting additional research, Allstate extended an increased tender two days later (“the second offer”). Mr. Lloyd rejected the second offer and ended that call by stating “you’ll be hearing from my attorney” and hanging up on the Allstate adjuster. Mr. Lloyd later invoked the policy’s appraisal clause and the appraisers ultimately agreed that the value of the vehicle was very close to Allstate’s second offer. Allstate paid the appraisal award, less Mr. Lloyd’s \$500 deductible.

Mr. Lloyd sued Deerbrook and Allstate alleging breach of contract, bad faith, and Consumer Protection Act violations. The trial court granted summary judgment in favor of the defendants on all claims and dismissed the case.

## **II. ISSUES PRESENTED**

1. Should this Court affirm summary judgment because the defendants dealt with their insured in good faith at all times and there is no evidence to the contrary?

2. Should this Court affirm summary judgment and dismiss Mr. Lloyd's breach of contract claim because the defendants were contractually entitled to subtract the \$500 deductible from the appraisal award, and therefore no breach occurred?

3. Should this Court affirm summary judgment because the plaintiff has not shown that defendants violated a WAC provision or other predicate statute and therefore cannot meet their burden of proving a per se violation of the CPA?

4. Should this Court affirm summary judgment because even assuming for the sake of the argument some type of statutory, code, or common law violation, Mr. Lloyd has not been harmed and has not submitted any admissible evidence of damages?

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

Jerry Lloyd owned a 2005 Chevrolet Malibu Classic that was involved in an accident on August 18, 2008 (hereafter, "the vehicle"). CP 54-55. At the time of the accident, Mr. Lloyd had an automobile insurance policy with Deerbrook Insurance Company, which insured the vehicle, subject to the conditions and terms of the policy. CP 114-51. Mr. Lloyd telephoned Deerbrook to report the accident on August 18, 2008, and subsequently reported the accident to Allstate the next day. CP. 57:16-25. Mr. Lloyd reported to Allstate, on August 26, 2008, that the vehicle was a total loss. CP 60:6-18.

Under the policy, the defendants owed Mr. Lloyd the actual cash value (“ACV”) of the vehicle at the time of loss, less the deductible of \$500. CP 149.

Allstate adjuster Steve Graham was assigned to Mr. Lloyd’s claim on September 9, 2008. CP 154. On that date, Mr. Graham offered Mr. Lloyd the value of the vehicle (\$5,105) as determined by Autosource Valuation Services, a third party source used to determine the market value of automobiles. CP 156; CP 198 at 18:23-19:3; CP 199 at 22:6-23:19. Mr. Lloyd rejected that figure. Mr. Graham then offered to do additional research regarding the sale price of similar vehicle at local car dealerships to check his valuation. Mr. Graham explained:

Q: ... After he [Mr. Lloyd] told you that [the September 9 offer] was insufficient ‘cause he’d seen more, what was your reaction?

A: [Mr. Graham] At that time I then offered to do additional research on the behalf of the insured as well as review any research and address any research that the customer has done to that point. And...

Q: And what additional research did you do?

A: I had AutoSource run an additional report based on quotes from franchise dealerships. I agreed with Mr. Lloyd that in this situation just ‘cause the vehicle was a few years old that maybe looking at private-party sales may not be the most appropriate way to come to the value of the vehicle and speaking with dealerships that would actually sell this vehicle on their lot may be the best way.

...

Q: So did you do that research, the additional research you promised to do with AutoSource?

A: Yes.

Q: And what was the result of that?

A: It showed a range to include tax and license from I believe 6600 and some-odd dollars to 7115, I think. That was the range that those two quotes showed from the low quote to the high quote.

CP 84:17-CP 85:16.

On September 11, 2008, two days after Allstate's initial offer, Mr. Graham contacted Mr. Lloyd intending to reach an agreement and pay the claim. Mr. Graham offered \$6,654.63, the lower of the two quotes AutoSource returned with the new approach, and Mr. Lloyd rejected that offer. Although the first quote was a reasonable offer, Mr. Graham intended to offer an amount equal to the second quote (\$7,115.75) as well if necessary to settle the claim. CP 89:3-16, CP 157. Mr. Lloyd wanted between \$9,000 and \$13,000 for his vehicle. CP 75:17-23. Before Mr. Graham had an opportunity to offer the second quote, Mr. Lloyd hung up on Mr. Graham, leaving Mr. Graham with the statement "you'll be hearing from my attorney." CP 89:3-8; CP 75:1-76:23. Defendants do not negotiate with claimants directly once they have retained an attorney, as it is a violation of WAC 284-30-330(19). CP 32:17-24. Further, the

defendants did not know who Mr. Lloyd's attorney was at this time. CP 89:17-24.

Over a month passed before Mr. Lloyd's attorney contacted Allstate. Allstate received a letter from Mr. Lloyd's attorney, Alana Bullis, on October 17, 2008. CP 89:20-24. Ms. Bullis' letter indicated that Mr. Lloyd wished to invoke "the appraisal process" (a form of arbitration provided for by the policy itself which can be used to determine the "Actual Cash Value" of a vehicle). CP 149, 158. The letter also indicated that Mr. Lloyd had selected Darrell Harber to be his appraiser. CP 172. Upon receipt of the letter, the defendants retained Mark Olson to serve as their appraiser, and Mr. Graham telephoned Ms. Bullis the same day. Ms. Bullis did not return Mr. Graham's call. CP 158.

On October 27, 2008, the two appraisers met and agreed to the value of the vehicle, without having to proceed to an appraisal hearing. CP 153, 172. The agreed value was \$6,683.79, plus tax and licensing fee. CP 153.

Mr. Graham again telephoned Ms. Bullis on October 29, 2008. Again, Ms. Bullis did not answer and Mr. Graham left another message for her. CP 159.

On November 3, 2008, Mr. Graham spoke to Ms. Bullis and explained that he would be sending Mr. Lloyd a check for \$6,815.16. CP

160. This amount was calculated as follows: \$6,683.79 (Actual Cash Value of the vehicle as determined through the appraisal process), + \$568.12 (tax) + \$47.75 (license fee) + \$15.50 (title transfer fee) = 7,315.16, - the \$500 deductible inherent in the policy. *Id.*; CP 118.

On November 20, 2008, Ms. Bullis telephoned Mr. Graham and explained that Mr. Lloyd wanted to retain the vehicle. CP 161. Based on this, Mr. Graham recalculated the amount owed to Mr. Lloyd, and subtracted the lowest quote found for the salvage value on the vehicle, \$545.38. CP 161, 170. This resulted in a payment of \$6,269.78. CP 162-63.

Ms. Bullis wrote Mr. Graham claiming that the agreed appraisal award “includes consideration by both appraisers for the deductible and for the salvage value of Mr. Lloyd’s vehicle.” CP 168. Mr. Graham checked with Allstate’s appraiser Mark Olson, who denied that this was so. CP 87:3-12; CP 170. Mr. Graham explained this in his letter to Ms. Bullis of November 20, 2008. CP 87, ll. 10-12; CP 170. Hearing nothing further from Ms. Bullis, Allstate tendered a check for \$6,269.78 on November 25, 2008. CP 163. We now know that on November 21, 2008, Mr. Lloyd’s appraiser Darrell Harber wrote Ms. Bullis confirming Mr. Olson’s report that in fact, neither the deductible nor the appraisal value was factored into the agreed appraisal award. CP 172.

Mr. Lloyd cashed the check on December 8, 2008. CP 163. The defendants heard nothing further from Mr. Lloyd or his attorney until January of 2009, when Mr. Lloyd's attorney called Allstate and said Mr. Lloyd wanted Allstate to take the vehicle. CP 88:11-20; CP 164. Accordingly, Allstate issued a check to Mr. Lloyd for \$545.38, effectively repaying the salvage value Allstate had initially subtracted from the payment to Mr. Lloyd. CP 166. Mr. Lloyd cashed this check on January 27, 2009. As of that date, the defendants had paid Mr. Lloyd a total of \$6,815.16 (the appraisal award of \$6,683.70 + tax, license fee, title transfer fee and less the \$500 deductible). CP 162, 166 The matter was finished and the claim was paid.

**A. PLAINTIFF'S COMPLAINT.**

Mr. Lloyd filed a lawsuit alleging violations of the duty of good faith and fair dealing, violations of various provisions of the Washington Administrative Code ("WAC"), violations of the Consumer Protection Act ("CPA"), and breach of contract. CP 7-11.

**B. SUMMARY JUDGMENT.**

Defendants moved for summary judgment and argued: (1) the breach of contract claim should be dismissed because defendants had paid the full amount of benefits owed under the policy; (2) the bad faith and CPA violation claims should be dismissed because plaintiff had produced

no evidence of bad faith or of violations of the Consumer Protection Act; and (3) that even if there was such evidence, Mr. Lloyd had suffered no damages as a result of defendants' conduct; and the bad faith and CPA violation claims could be dismissed for that reason as well. CP 18-37, 42-177, 308-13.

Mr. Lloyd did not offer any expert opinion or other evidence as to the value of the vehicle, but instead argued that because Allstate's offer on September 9, 2008 (of \$5,105) was less than its offer on September 11, 2008 (of \$6,654.63), that the first offer was made in bad faith. Mr. Lloyd did not articulate why he felt this offer was unreasonable and offered no testimony from a qualified expert that it was unreasonable.

Mr. Lloyd also argued, inaccurately, that Mr. Graham reduced Allstate's valuation of the vehicle from an initial value of \$8,510 to \$5,105. As Mr. Graham testified, the initial \$8,510<sup>1</sup> figure was the value for a 2005 Chevy Malibu with normal or expected mileage. CP 199 at 22:22-23:1-5. Mr. Lloyd's vehicle had much higher than normal value, and so his vehicle was worth \$5,105 according to AutoSource. *Id.* Mr.

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<sup>1</sup> Mr. Lloyd claims the vehicle was valued at \$8,325, but this citation is to a N.A.D.A. value for a 2005 Chevrolet Malibu with typical mileage. CP 271. The Autosource valuation was slightly more (\$8,510). CP 264.

Lloyd's vehicle was never valued at \$8,510 by anyone, and there is no evidence to the contrary.

Finally, Mr. Lloyd argued that it was improper for the defendants to subtract the \$500 deductible from the vehicle's value, apparently arguing that the appraisers' agreed value trumps the language of the policy.

The trial court granted defendants' motion in its entirety. CP 293-94. The court ruled that there were no issues of material fact and that there was insufficient evidence to support plaintiff's claims of bad faith and violations of the CPA. RP 33:17-19.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW.**

Summary judgment awards are reviewed de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56 (c); *Kesinger v. Logan*, 113 Wn.2d 320, 325, 779 P.2d 263 (1989).

Here, summary judgment was properly granted because Mr. Lloyd has not presented sufficient evidence to support his claims, and because defendants have fulfilled their common law and statutory duties to Mr. Lloyd. Summary judgment is properly granted where, as here, the non-

moving party lacks sufficient evidence to prove its case. *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689, *rev. denied*, 122 Wn.2d 1010 (1993); *Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Further, defendants are also entitled to summary judgment on the issue of breach of contract because they met their obligations and duties under the policy, and therefore that claim was properly dismissed as a matter of law. Appellate courts interpret insurance contracts *de novo*. *Wheeler v. Rocky Mountain Fire & Casualty Co.*, 124 Wn. App. 868, 871, 103 P.3d 240 (2004), *rev. denied*, 155 Wn.2d 1002 (2005). Questions of contract interpretation are pure issues of law and are appropriately decided on summary judgment. *See American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874, 854 P.2d 622 (1993).

**B. MR. LLOYD PRODUCED NO EVIDENCE OF ALLEGED VIOLATION OF THE DUTY OF GOOD FAITH AND FAIR DEALING.**

The trial court granted the defendants' motion for summary judgment because it found that there were no material issues of fact with

regard to whether the defendants' conduct was reasonable. RP 33:17-19.

As this Court has explained:

“To succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was ‘unreasonable, frivolous or unfounded.’” The insured may not base a bad faith or CPA claim on an insurer's good faith mistake, which occurs when the insurer acts honestly, bases its decision on adequate information, and does not overemphasize its own interest. Just as any other tort, the insured must prove duty, breach of duty, and damages proximately caused by any breach of duty. Harm to the insured is an essential element of every bad faith or CPA claim.

*Werlinger v. Clarendon National Ins. Co.*, 129 Wn. App. 804, 808, 120 P.3d 593 (2005), *rev. denied*, 157 Wn.2d 1004 (2006) (footnotes omitted).

Mr. Lloyd produced no evidence that the defendants acted unreasonably at the trial court level and he raises no argument about specific evidence on appeal.

Allstate made two offers to Mr. Lloyd during the course of the claim: \$5,105 on September 9, 2008 and \$6,654.63 on September 11, 2008. Both times, Allstate relied on Autosource Valuation Services (a third party vendor) to determine the value of the vehicle, based on information input by Allstate employees. *See* CP 198 at 18:20-CP 199 at 20:5. With the correct mileage factored in for Mr. Lloyd's vehicle, Autosource initially valued the vehicle at \$5,105. CP 199 at 23:3-19. This is undisputed. Mr. Lloyd has made no showing that the defendants

acted unreasonably in offering this amount to Mr. Lloyd. Mr. Lloyd's counsel states his opinion that the offer is unreasonable, but there is no expert contradicting the Autosource valuation, nor any other evidence or testimony that the offer of \$5,105 was unreasonable. At oral argument, the following exchange occurred regarding evidence of the value of Mr. Lloyd's vehicle:

THE COURT: Excuse me.

I didn't see anything, Mr. Brooks, in your – I didn't see an affidavit or declaration reflecting this higher value. Did I miss it?

...

THE COURT: And let me ask it again. I'm sorry. Could you point me, in the declarations or statements, where the valuation was between \$8,000 and 10,000. Right?

MR BROOKS: Do I have . . . an expert that responded to this and said that it's between eight and ten thousand dollars? No.

*See* RP 7:2-8:7.

With no expert or other evidence of the value of Mr. Lloyd's vehicle, Mr. Lloyd attempted to make his case based on the AutoSource evaluations used by Allstate. The highest opinion of the value of Mr. Lloyd's vehicle found anywhere in the record is the \$6,683.79 value agreed upon by the two expert appraisers. CP 153. On appeal, Mr. Lloyd does not argue that Allstate's offer of \$6,654.63 on September 11, 2008

was unreasonable, presumably because it is so close to the value Mr. Lloyd's expert later agreed upon through appraisal. CP 153. In fact, Mr. Lloyd himself testified that the \$6,654.63 offer "was comparable to the appraisal [value]." CP 76:8-14. Clearly, therefore, the \$6,654.63 offer was reasonable and there is no evidence (or even a contention) to the contrary on appeal.

The only question here, then, is whether Allstate's \$5,105 offer of September 9, 2008 was reasonable where it was based upon an Autosource valuation and where Allstate offered a second, larger amount two days later, after researching the value through a different method (dealership sale values as opposed to private sale values), as requested by Mr. Lloyd.

Mr. Lloyd's sole argument as to why the \$5,105 offer was unreasonable is because it was lower than the offer Mr. Graham made two days later, which was comparable to the value of the vehicle as ultimately determined through appraisal. This mere comparison of the two numbers, with no further testimony or evidence, is precisely the type of argument that the court ruled is insufficient to raise a material issue of fact as to bad faith in *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 915 P.2d 1140 (1996). In *Keller*, as here, plaintiffs asserted claims of bad faith and violations of the CPA based on the fact that a fact finder (a jury in *Keller*, an appraisal hearing here) ultimately returned a higher value than Allstate

initially offered on a claim. *Keller*, 81 Wn. App. at 626. The trial court, following a one-day trial on a stipulated record, found that the jury's verdict of \$75,000 (\$50,200 to be paid by Allstate) was not "a fluke or runaway verdict," was "the result of exceptional work by plaintiff's Counsel," and "that Allstate had not acted in bad faith." *Keller*, 81 Wn. App. at 629. The Kellers appealed, arguing that Allstate's \$8,000 offer was bad faith as a matter of law in light of the much larger ultimate recovery.

The *Keller* court explained:

To determine whether a defendant acted reasonably, fairly, or deceptively, it is necessary to consider the circumstances surrounding the allegedly improper act. Adoption of a strict number comparison approach would make an insurer strictly liable for damages any time its pretrial evaluation of a claim turned out to be substantially less than the jury's verdict. It would not allow consideration of the reason for the disparity, or require a finding that the insurer's wrongdoing was a cause of the disparity.

*Keller*, 81 Wn. App. at 633.

The court in *Keller* ruled that Allstate had not violated the CPA because "[t]he record here contains abundant evidence that Allstate had such reasonable justification for its offer." *Keller*, 81 Wn. App. at 634.

Similarly here, Mr. Lloyd's only "evidence" as to how the defendants acted unreasonably is that the initial offer of \$5,105 is less than the ultimate value awarded to Mr. Lloyd through appraisal of \$6,683.79.

The Allstate defendants had a reasonable basis for the offer of \$5,105 (the Autosource valuation, as explained by Mr. Graham) and Mr. Lloyd has presented no evidence or testimony to the contrary. *See* CP 199-200.

**C. THE VEHICLE WAS NEVER VALUED AT \$8,510 BY ANYONE.**

Mr. Lloyd's claim that Mr. Graham reduced Allstate's evaluation of the value of the vehicle from \$8,510 to \$5,105 is inaccurate and misleading. In reality, Mr. Lloyd's vehicle was never valued at \$8,510 by anyone. Autosource reported that a 2005 Chevrolet Malibu with average mileage would be valued at that level. *See* CP 199 at 22:20-23:5. But this hypothetical vehicle is not at issue in this case. Mr. Lloyd's vehicle had unusually high mileage, and Autosource valued that vehicle at \$5,105. CP 199 at 22:8-17. Therefore, Mr. Graham did not "reduce" an amount to \$5,105 as Mr. Lloyd claims in his appellate brief. Brief of App. at 17. Rather, Mr. Graham saw that the initial report was mistakenly calculated based on average mileage of a 2005 Chevy Malibu and he corrected the error by inputting the correct mileage. With the correct mileage factored into the evaluation, Autosource reported the value of the vehicle to be \$5,105. CP 199 at 22:8-17. Mr. Lloyd has produced no evidence or testimony that the \$5,105 offer was unreasonable beyond pointing out that it was less than the amount Mr. Lloyd was ultimately awarded, and based on *Keller*, this is insufficient.

Further, to the extent Mr. Lloyd is relying on the initial Autosource valuation to show that his vehicle was worth more than \$5,105, this valuation is both incorrect and inadmissible hearsay. Steven Graham clearly testified that the initial report was inaccurate because the mileage was not taken into account, and that is why no offer was made based on the initial report. CP 199 at 22:8-23:5; *See also* RP 9:4-10:2. Mr. Lloyd has produced no evidence or testimony to the contrary, and the out of court, erroneous Autosource valuation in the absence of such testimony is inadmissible hearsay. ER 801-802. Defendants made this objection before the trial court and so it is preserved on appeal. CP 309; RP 9:4-23. Further, Mr. Lloyd's interpretation of the initial AutoSource report is, at best, inaccurate, highlighting the need for someone with knowledge of the report or an expert in the field to interpret the report. Mr. Lloyd produced no such testimony, and the Court should disregard the initial Autosource report which did not have the correct mileage factored in.

There is simply no admissible evidence to support Mr. Lloyd's argument that the defendants were unreasonable, and the trial court's grant of summary judgment should be affirmed.

**D. WAC 284-30-330(19) PROHIBITS AN INSURER FROM NEGOTIATING A CLAIM DIRECTLY WITH A REPRESENTED CLAIMANT.**

Mr. Lloyd argues that the defendants acted unreasonably by not contacting him after September 11, 2008 and offering him more money.

WAC 284-30-330(19) prohibits, in relevant part:

Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent.

Mr. Graham offered reasonable amounts to Mr. Lloyd on September 9 (based on the initial Autosource valuation, looking at private sales of similar vehicles) and September 11, 2008 (based on a second Autosource valuation, looking at similar vehicles for sale in dealerships) as explained above, and Mr. Lloyd responded by telling Mr. Graham that he would be hearing from his attorney and hanging up on Mr. Graham.

CP 89. Mr. Graham explained:

Q: Mr. Graham, do you recall how your conversation with Mr. Lloyd on September 11, 2008, ended?

A: He advised me that the vehicle was worth 9- to 13,000 and that we'd be hearing from his attorney. And then he hung up on me.

CP 89:3-8.

Mr. Lloyd argues now that because Mr. Graham's research resulted in a range of value for the vehicle between \$6,654.63 and \$7,100, and because Mr. Graham had only offered the \$6,654.63 at this point, that

Mr. Graham should have offered Mr. Lloyd the \$7,100. Brief of App. at 14-15. Mr. Lloyd even speculates that Mr. Graham did not offer the \$7,100 because he was “being vindictive because the plaintiff would not take their offer of \$5,10[5] and then \$6,6[54.63], and he said he was going to hire a lawyer.” Brief of App. at 15. There is no evidence or testimony supporting these self-serving accusations, and the court should disregard them. *See* CR 56(e); *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988) (wherein the court rejected an affidavit from the plaintiff because the plaintiff’s conclusory statements and opinion on ultimate facts did not constitute a setting forth of facts upon personal knowledge, as required by CR 56(e)).

In reality, it was Mr. Lloyd who ended negotiations and did not give the defendants an opportunity to make such an offer. Rather than continue to negotiate, Mr. Lloyd hung up on Mr. Graham and told him he would be hearing from Mr. Lloyd’s attorney. It was reasonable for Mr. Graham to make no further attempt to negotiate directly with Mr. Lloyd until he heard from the attorney, and particularly so when Mr. Lloyd was demanding between \$9,000 and \$13,000 and where there is no evidence the vehicle was worth anything close to that amount. *See* CP 89.

But even putting the reasonable conduct of Mr. Graham aside, once Mr. Lloyd told Mr. Graham that he would be hearing from Mr.

Lloyd's attorney, without identifying the attorney, there was nothing more Mr. Graham could do. He could not make an offer to Mr. Lloyd directly because WAC 284-30-330(19) prohibits negotiating or settling a claim with a represented claimant. Mr. Lloyd had not identified his attorney and had ended negotiations. Mr. Graham reasonably concluded that he was not to contact Mr. Lloyd and continue negotiating directly, but rather, he was to wait to hear from Mr. Lloyd's attorney. There is no evidence to the contrary.

**E. THE DEFENDANTS ARE CONTRACTUALLY JUSTIFIED IN SUBTRACTING THE \$500 DEDUCTIBLE FROM THE APPRAISAL AWARD.**

Mr. Lloyd's argument that Allstate breached the appraisal clause of the policy by not paying the full amount of the appraisal award is really an argument that Allstate was not contractually justified in subtracting the deductible from the award. Brief of App. at 19. Tellingly, Mr. Lloyd cites no policy language to support his argument.

The interpretation of an insurance policy is a question of law, and therefore appropriately decided on summary judgment. *See American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874, 854 P.2d 622 (1993). When interpreting an insurance policy, Washington courts adhere to the fundamental principle that courts "must be guarded in . . . interpretation of an insurance contract as it is elementary law, universally accepted, that the

courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves.” *Chaffee v. Chaffee*, 19 Wn.2d 607, 625, 145 P.2d 244 (1943) (citing 12 Am. Jur. *Contracts* §228, at 749).

Mr. Lloyd’s insurance policy provides, in relevant part:

**Limits of Liability**

**The Company’s** limit of liability is the lesser of:

1. the actual cash value of the property or damaged part of the property at the time of loss, which may include a deduction for depreciation; . . .

. . .

Any applicable deductible amount is then subtracted.

CP 149 (boldface in original).

From the plain wording of the policy, the defendants’ limit of liability is the ACV of Mr. Lloyd’s vehicle at the time of loss, from which the applicable deductible (here, \$500) is subtracted. *Id.* Washington courts enforce insurance contracts as written when they are plain and unambiguous (as here). *See e.g., Wheeler*, 124 Wn. App. at 872.

The deductible was never considered during appraisal, and this is undisputed. *See* CP 90, 170, and 172. In fact, Mr. Lloyd’s own appraisal expert, Darrel Harber, confirmed in writing that the deductible was not discussed or factored into the appraisal award in any way. CP 172.

Mr. Lloyd argues that the defendants should not have subtracted the deductible from the appraisal award, despite the language in the policy and despite the fact that it was never considered at appraisal. Mr. Lloyd cites *Bainter v. United Pacific Ins.*, 50 Wn. App. 242, 748 P.2d 260, *rev. denied*, 110 Wn.2d 1027 (1988) in support of this argument, however the court in *Bainter* did not have a similar issue before it. *Bainter* concerned an appraisal award that was challenged on the basis that it was grossly disproportionate to the damage sustained, and based on allegations of unfairness, bias, lack of impartiality, and unethical conduct. *Bainter*, 50 Wn. App. at 245. There was no mention of a deductible in the *Bainter* decision.

In fact, the only portion of *Bainter* that has any relevance to the issue in this case is the *Bainter* court's recitation of the general rule that "when an appraisal clause in an insurance policy is invoked, the award is conclusive as to the amount of loss." *Bainter*, 50 Wn. App. at 246, citing 14 G. Couch, *Insurance* § 50:55, at 205 (2d ed. 1982) (emphasis added).

This general rule, however, supports the trial court's ruling here. The policy provides that once the loss is determined (as through appraisal), any applicable deductible is *then* subtracted. CP 149. The result of the appraisal process was "an Award of the Loss in the amount of \$6,683.79" plus sales tax and licensing fee. CP 153. The appraisal award

is conclusive as to the amount of the loss, which in this case was \$6,683.79. CP 153; *Bainter*, 50 Wn. App. at 246. From that “loss,” any applicable deductible is then subtracted. This is clear from a reading of the plain wording of the policy. CP 149. The Allstate defendants were within their contractual rights to subtract the \$500 deductible from the loss value as determined through appraisal.

To the extent Mr. Lloyd’s argument is that the appraisers agreement as to the ACV of the vehicle should somehow trump the policy language, this argument is also unfounded because it is clear from the both plain language of the policy and Mr. Graham’s testimony that the intent of the appraisal process is to determine “the loss” or the ACV, not the loss after the deductible is subtracted. *See* CP 149. The policy states, in relevant part:

**Right to Appraisal**

Both **you** and **The Company** have a right to demand an appraisal of the loss. Each will appoint and pay a qualified appraiser. Other appraisal expenses will be shared equally. The two appraisers, or a judge of a court of record, will choose an umpire. Each appraiser will state the actual cash value and the amount of loss. If they disagree, they will submit their differences to the umpire. A written decision by any two of these three persons will determine the amount of the loss.

CP 149 (underscoring added).

It is clear the appraisal process was meant to determine the amount

of the loss. *Id.* A deductible is always subtracted from a loss and the policy at issue here provided as much. *See* CP 149. Mr. Lloyd's argument that the appraiser's agreement somehow trumps the policy language giving rise to the appraisal is nonsensical and is unsupported by law or fact.

**F. DEFENDANTS DID NOT VIOLATE THE CPA BY SUBTRACTING THE \$500 DEDUCTIBLE.**

Mr. Lloyd's sole argument that the defendants violated the CPA is that Allstate violated the CPA by "refus[ing] to pay the appraisal award," which again, is a dispute about the \$500 deductible and that subtracting the deductible violated WAC 284-30-330(6). Brief of App. at 24.

To show a per se violation of the CPA, a claimant must show:

(1) the existence of a pertinent statute; (2) its violation; (3) that such violation was a proximate cause of damages sustained; and (4) that they were within the class of people the statute sought to protect.

*Keyes v. Bollinger*, 31 Wn. App. 286, 289-90, 640 P.2d 1077 (1982).

WAC 284-30-330(6), the only code that Mr. Lloyd alleges the defendants violated, prohibits an insurer from:

Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to promptly pay property damage claims to innocent third parties in clear liability situations. If two or more insurers share liability, they should arrange to make appropriate payment, leaving to themselves the burden of apportioning liability.

Mr. Lloyd has admitted that Allstate offered a value comparable to ultimate appraisal value on September 11, 2008, but argues that by subtracting the deductible, the defendants violated WAC 284-30-330(6). CP 76:8-14. Because the defendants were contractually within their rights to subtract the deductible, the defendants had offered a value comparable to full value on September 11, 2008. Accordingly, the defendants did not violate WAC 284-30-330(6) and Mr. Lloyd's CPA claim can be dismissed because no predicate statutory violation occurred.

**G. INSURANCE COMPANIES ARE NOT TRUE FIDUCIARIES.**

Mr. Lloyd devotes a large portion of his brief to discussing the duty owed by a fiduciary. Brief of App. at 15-16. Mr. Lloyd did not raise any issue concerning fiduciary duty in briefing or in oral argument at the trial court level, and the Court need not consider it on appeal. RAP 9.12.

But even if the Court were inclined to consider this issue, Mr. Lloyd was never a fiduciary of the defendants. The Washington Supreme Court has held that an insurer is not a true fiduciary. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992). The *Butler* case explains *Tank*, the case appellant cites for his misguided fiduciary argument, and explains that the duty an insurer owes to its insured is not a true fiduciary duty:

It is clear from the language of *Tank*, however, that the fiduciary relationship between an insurer and an insured is not a true fiduciary relationship. *Tank* holds that an insurer must give “*equal* consideration” to the insured's interests. (Italics ours.) Under a “true” fiduciary relationship, however, the insurer would have to place the insured's interests above its own. Thus, the *Tank* holding indicates that something less than a true fiduciary relationship exists between the insurer and the insured.

*Butler*, 118 Wn.2d at 389-90 (underscoring added) (citations omitted).

As noted insurance law commentator, Thomas Harris, has explained:

The characterization of an insurer's responsibility as “fiduciary” is neither analytically precise nor functionally helpful. In fact, the courts' use of the term “fiduciary” in insurance cases has been muddled and confusing . . . After reconsidering its earlier characterization of the insurer-insured relationship, the court in *Butler* has offered the conceptually murky characterization that the relationship between an insurer and its insured has “fiduciary aspects,” but is “something less” than a true fiduciary relationship.

. . . The court recognized in *Van Noy* [*v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 16 P.3d 574 (2001)] that, while an insurer had an enhanced duty of good faith in dealing with its insured, it did not have an “enhanced fiduciary obligation” to its insured. An insurer does not act as a “true fiduciary” when dealing with its insured.

Thomas V. Harris, *Washington Insurance Law*, at 2-5 to 2-6 (3d ed. 2010)

(footnotes omitted).<sup>2</sup>

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<sup>2</sup> The Washington Supreme Court has cited other portions of this treatise approvingly. See e.g., *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007).

Recent Supreme Court decisions confirm the absence of a true fiduciary relationship. “Because an insurer must give equal consideration to an insured, but is not required to put the insured above itself, this court has also noted that the relationship between an insured and an insurer is not a true fiduciary relationship.” *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130 n.3, 196 P.3d 664 (2008) (emphasis omitted). Accord *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Inc.*, 161 Wn.2d 903, 915 n.9, 169 P.3d 1 (2007) (insurer’s duty is less than a fiduciary relationship, which would require insurer to place insured’s interests above its own).

Mr. Lloyd is not a fiduciary of Allstate or Deerbrook.

**H. EVEN IF MR. LLOYD HAD PRESENTED EVIDENCE OF BAD FAITH AND/OR VIOLATION OF THE CPA, MR. LLOYD HAS INCURRED NO DAMAGES.**

The only damages that Mr. Lloyd claims to have suffered in this case is the \$500 deductible discussed above, and “loss of use” while waiting for the defendants to pay his claim.

With regard to the loss of use damages, Mr. Lloyd testified that the \$6,654 offer Allstate made to Mr. Lloyd on September 11, 2008 was comparable to the value of the vehicle as determined through appraisal. *See* CP 76 at 50:8-14. Mr. Lloyd turned down that offer. CP 76:18-23. By turning down an offer that was comparable to the value of the vehicle,

hanging up on Mr. Graham, and ending negotiations, Mr. Lloyd caused any delay (and therefore loss of use damages) he incurred.

With regard to the deductible amount, as explained above, Mr. Lloyd's contract with the Allstate defendants provided for the \$500 deductible, and Mr. Lloyd is not entitled to any damages based on enforcement of that contract.

Further, a claimant "must suffer injury to his 'business or property' in order to recover under the Consumer Protection Act." *Keyes v. Bollinger*, 31 Wn. App. 286, 295, 640 P.2d 1077 (1982). Mr. Lloyd has suffered no such injury to his business or property and has, in fact, recovered the full amount owed under his policy. The summary judgment dismissing Mr. Lloyd's CPA claim can be affirmed for that reason as well.

#### **I. THE INSURANCE FAIR CONDUCT ACT.**

Mr. Lloyd also refers to the Insurance Fair Conduct Act (RCW 48.30.010, and RCW 48.30.015) in the damages section of his appellate brief. Brief of App. at 24. Mr. Lloyd has raised no issue with regard to the IFCA on appeal and he did not argue the IFCA at the trial court level, other than a reference to it in discovery responses during the litigation. *See, e.g.*, CP 105. Mr. Lloyd has not preserved an issue with respect to IFCA on appeal, and the Court need not consider it now. RAP 9.12.

But even if the Court were inclined to consider the IFCA on appeal, Mr. Lloyd made no attempt to comply with the provision that requires a letter be sent to the insurer and the Office of the Insurance Commission a minimum of 20 days prior to filing suit, and this claim can be dismissed for that reason as well. RCW 48.30.015(8)(a).

**J. RESPONDENTS ARE ENTITLED TO AN AWARD OF FEES ON APPEAL.**

Respondents are entitled to an award of fees on appeal under RAP 18.9 because this appeal is frivolous. A comprehensive review is set out in *Delany v. Canning*, 84 Wn. App. 498, 509-10, 929 P.2d 475 (1997), *rev. denied*, 131 Wn.2d 1026 (1997):

A final issue is whether attorney fees are appropriate on appeal. RAP 18.9 authorizes an award of terms or compensatory damages against a party who “uses these rules for the purposes of delay, files a frivolous appeal, or fails to comply with these rules. . . .” In addition, CR 11 discourages filings that are not “well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that [are] not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” The rule permits a court to award sanctions, including expenses and attorney fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. *See Wilson v. Henkle*, 45 Wn. App. 162, 174, 724 P.2d 1069 (1986).

The following considerations appeal in determining whether an appeal is frivolous:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should

be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

*Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980).

Here, the appeal is plainly frivolous. Mr. Lloyd asserts a claim for breach of contract without citing any of the contract language that he claims supports his position. He further argues that Allstate and Deerbrook unreasonably valued the vehicle but he provides no evidence or expert opinions of the value of the vehicle beyond those gleaned from Allstate's claim file. There was no reasonable possibility of reversal when this appeal was filed, and respondents should be awarded fees accordingly.

## V. CONCLUSION

There is no evidence or testimony upon which a fact finder could possibly find that the defendants acted unreasonably in this case. Allstate offered the full amount of the value of the vehicle as determined by Autosource, based on a search of private sale values of similar vehicles in the area. Two days later, after Mr. Lloyd rejected the first offer, Allstate offered the value of a vehicle Autosource found for sale through a dealership that was similar to Mr. Lloyd's vehicle. Mr. Lloyd ended

negotiations and initiated appraisal, which resulted in a value comparable to Allstate's second offer. There simply is no admissible evidence or testimony that either of the offers was unreasonable.

Further, the policy clearly provides that the defendants are entitled to a \$500 deductible before any loss is paid. The fact that Mr. Lloyd requested appraisal to determine the value of his loss does not void the deductible. The trial court's grant of summary judgment on both issues should be affirmed, and the respondents should be awarded fees.

Finally, given that Mr. Lloyd concedes that the September 11, 2008 offer was a reasonable one (CP 65:4-16; CP 76:8-14), even if the September 9, 2008 offer had not been, Mr. Lloyd suffered no damage where the defendants made a reasonable offer two days later. The trial court can be affirmed for any or all of the above reasons.

DATED this 13<sup>th</sup> day of April, 2011.

**REED McCLURE**

By 

**Marilee C. Erickson**

**WSBA #16144**

**Jason E. Vacha**

**WSBA #34069**

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DATED this 13<sup>th</sup> day of April, 2011.

*Ray C. Brooks*  
AFFIANT

SIGNED AND SWORN to before me on April 13, 2011 by  
Leone Powers.

Leone R. Powers  
Print Name: Leone R. Powers  
Notary Public Residing at Sno. Co. WA  
My appointment expires: 1/5/2015

