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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NO. 675079

ETHAN ALLEN AND DOROTHEA MARSHALL,

Appellants,
v.

STATE FARM FIRE AND
CASUALTY COMPANY,

Respondent.

APPELLANTS' REPLY BRIEF

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5 B. Wash. Prac., Evidence Law and Practice (5th ed.) 8

Harris, Washington Insurance Law, 2 ed. § 7.1 5

New Oxford American Dictionary, 3rd Edition (2010) 2, 7

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I. REPLY TO APPRAISAL ARGUMENTS

A. The Proper Scope of Appraisal.

The parties agree that the "amount of loss" is to be determined by the appointed appraisers. However, State Farm repeatedly argues that "extent of loss" is different from "amount of loss" and is not subject to appraisal.[1] State Farm's narrow interpretation of its appraisal obligation is contrary to most authority and disregards the ordinary meaning of the words "amount" and "extent."

- **Comparison of Authority.**

  Though there is no Washington appellate decision on the scope of an appraisal of the "amount of loss", appellants have cited Supreme Court decisions in State Farm cases from Texas and Florida in which State Farm Companies lost on this specific issue.[2]

  State Farm relies only on a single New York published decision from an Erie County *trial court* which includes an

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[1] Respondent's Brief at pp. 3, 4, 30, 31, 32.
[2] Appellant's Brief at pp. 15, 16, 17.

internal cite to an out of context quote from a 60 year old Missouri case.[3]

- **Dictionary Definitions.**

State Farm directs the Court to dictionary definitions of the word "appraisal."[4] However, there is no dispute about the meaning of that term.

The dispute here is whether "the *amount* of loss" includes the *extent* of the loss. Dictionary definitions of these controlling words show that State Farm is mistaken.

> "Amount" – a quantity of something, typically the total of a thing or things in number, size, value, or extent. (emphasis added)
>
> "Extent" – the degree to which something has spread; the size or scale of something.[5]

Queen City Farms v. Central Nat. Ins. Co., 126 Wn.2d 50, 77 (1994) instructs that:

> Undefined terms "are to be interpreted in accord with the understanding of the average purchaser of insurance, and the terms are to be given their plain, ordinary and popular meaning. The meaning may be ascertained by referenced to standard English dictionaries.

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[3] Respondent's Brief at p. 35.

[4] Respondent's Brief at p. 30.

[5] New Oxford American Dictionary, 3rd Edition (2010), and on-line.

- **Did State Farm Wrongly Limit or Deny the Right to Appraisal?**

State Farm repeatedly states that it was the policyholder that stopped the appraisal process.[6] But there is substantial evidence to the contrary.

- Declaration of Roger Howson denying State Farm's assertion that he said the appraisal could not continue. (CP 128)
- Declaration of Plaintiff Dorothea Marshall stating she did not authorize anyone to stop the appraisal. (CP 133)
- State Farm's letter to Plaintiffs and its own appraiser directing that "the only items the appraisers can address are the damages identified in the PET report. (CP 23)

Whether State Farm unreasonably limited or denied the right to appraisal is a question of fact that should not have been resolved on the competing evidence presented.

II. REPLY TO WAC VIOLATION AND BAD FAITH ARGUMENTS

A. Promptness.

State Farm's brief does not explain why it fell so short of the WAC 284-30-370 requirement to complete claim investigations within thirty days "unless the investigation cannot reasonably be

[6] Respondent's Brief at pp. 2, 13, 27, 28.

completed within that time." More than twice that time passed before State Farm even obtained its contested engineers report (CP 68) and nine months passed before State Farm secured a cost estimate for the portion of repairs that were uncontested. (CP 68) This unexplained delay is evidence of violation of an insurance regulation against a specific unfair claims settlement practice.

B. <u>Investigation</u>.

State Farm sticks tenaciously with the January 30, 2007 report of its retained engineers, PET, insisting that the identification of the extent of lightning damage listed in that report could not be challenged in appraisal. (CP 123) The only other investigations it conducted were inspections by Case Forensics nineteen months after the loss – well after most repairs had been completed, including replacement of the chimney at the policyholders' own expense. (CP 98, 104)

"Expert opinions" obtained by an insurance company are not the ultimate authority on the extent of a challenged loss. Substantial evidence supports the claim that State Farm violated WAC 284-30-330(4) by failing to conduct "a reasonable investigation" of plaintiff's claims before denying all claims not embraced by its PET report.

- There is evidence of haphazard inspection of the chimney by PET.[7]
- State Farm's decided not to accept its insureds invitation to inspect the chimney while open for repair. (CP 125 and 98)
- Both of the professional appraisers urged State Farm to conduct additional investigations. (CP 70 and 96)

Whether the denial was preceded by "reasonable investigation" as required by WAC 284-30-330(4) is a question of fact that should not have been resolved on summary judgment.

C. <u>Bad Faith</u>.

Plaintiffs' presented substantial evidence of bad faith to defeat summary judgment.

- Violation of WAC 284-30-330 and 284-30-370, requiring *prompt* and *reasonable* investigation of claims constitutes a breach of an insurers duty of good faith. RCW 48.30.010 and <u>Harris, Washington Insurance Law</u>, 2 ed. § 7.1.

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[7] Listed with citations to record on pp. 11 and 12 of Appellants' Brief.

- Violation of these specific WAC's are violations of the Insurance Fair Claims Act ("IFCA") RCW 48.30.015(5) (a) and (d).
- Enforcing an unreasonable interpretation of its appraisal obligation is evidence of bad faith under Tank v. State Farm, 105 Wn.2d 381, 385-6 (1986) as it infers that State Farm failed to give "*equal*" consideration *in all matters* to the insureds interests." (Emphasis by the Court.) Also see, Anderson v. State Farm, 101 Wn. App. 323 (2000).
- State Farm's refusal to extend appraisal rights to its insured evidences a violation of IFCA's purpose to eliminate the "unreasonable denial of a claim for coverage or payment of benefits." RCW 48.30.015.

It is generally for the trier of fact to decide if an insurer has violated its duties of good faith. Anderson v. State Farm, 101 Wn. App. 323, 336 (2000).

III. REPLY TO EVIDENCE ARGUMENTS

A. Proof to establish the "amount of loss" at trial.

There is substantial evidence that State Farm limited and/or denied its policyholders' right to an informal appraisal.

After having denied their insureds right to have the amount of their October 21, 2006 loss promptly and inexpensively determined by appointed appraisers, State Farm now argues that plaintiffs have no right to a trial unless they present qualified experts "competent to testify whether certain observed conditions were in fact caused by the lightning strike."[8] On issues of "the amount of loss" plaintiffs should not be forced to finance a "battle of trial experts" which favors a financially strong insurer. The insurer should not gain a tactical benefit from wrongfully denying the right to appraisal.

- **The appraisers can testify to the amount of loss.**

The appointed appraisers were required by the policy and insurance regulations to be "competent and disinterested."[9]

> "Competent" – Having the necessary ability, knowledge, or skill to do something successfully.[10]

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[8] Respondent's Brief at p. 20.

[9] See Appendix to Appellants' Brief.

[10] New Oxford American Dictionary, 3rd Edition (2010), and on line.

- State Farm has not challenged either appraisers' ability, knowledge or skill to carry out the appraisal. These appraisers were competent to carry out the appraisal, and they are competent to testify about their appraisal of the amount of loss.
- The appraisers gathered a great deal of information on the loss.[11] State Farm does not argue that the appraisers had not gathered sufficient information to appraise the loss. State Farm's only complaint is its belief that the appraisers would have considered evidence that didn't meet the standards of the Rules of Evidence for court trials.[12] But, competent appraisers are not limited by the Rules of Evidence.

- **<u>The policyholders own testimony is admissible to establish the amount of loss</u>.**

> When damages involve the loss of property or damage to property, a party can testify as to specific terms of loss and can state an opinion on the value of the loss on any individual item.
>
> > 5 B. Wash. Prac., Evidence Law and Practice(5th ed.) Rule 701 Opinion Testimony by Lay Witnesses. § 701.17 Specific applications - Damages.

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[11] See Appellants' Brief p. 20

[12] See Respondent's Brief p.20

Also see, Cowan v. Jensen, 79 Wn.2d 844, 846 (1971) and Cunningham v. Town of Tieton, 60 Wn.2d 434 (1962).

- **Circumstantial evidence.**

Plaintiff Dorothea Marshall can give circumstantial evidence of what she observed in her home before the lightning strike; what she witnessed during the strike; its immediate aftermath; and changes she observed in her home after the strike. Of course, this evidence would be subject to vigorous cross-examination by State Farm.

IV. CONCLUSION

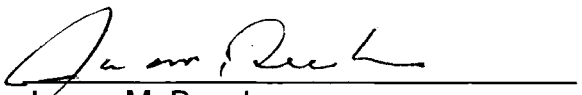
Substantial evidence was presented to allow a jury to conclude that State Farm violated insurance regulations requiring the prompt, reasonable investigation of its insureds' claim and that it breached the required appraisal obligation to set the amount of the loss from the lightning strike.

At trial the appraisers should be allowed to present their findings and opinions on the amount of the loss consistent with the normal appraisal processes rather than requiring the formal Rules of Evidence be followed to reach the amount of the insured loss.

Contractual and extra-contractual violations established at trial should be subject to the relief provided by insurance regulations, case law and Court Rules.

Respectfully submitted this 22nd day of March 2012.

HACKETT, BEECHER & HART



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CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury of the laws of the State of Washington, that on March 22, 2012, I caused to be delivered a true and correct copy of: Appellants' Reply Brief by ABC Legal Messengers, Inc. to:

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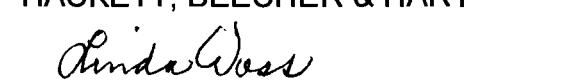

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