No. 89845-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOEL JOHNSON,

Petitioner/Appellant,

v.

SAFECO INSURANCE COMPANY OF AMERICA and MOUNT VERNON FIRE INSURANCE COMPANY,

Respondents.

ANSWER TO PETITION FOR REVIEW

Of a Court of Appeals Decision in Case No. 68029-3-I

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I. Identity of Respondent

Respondent, Mount Vernon Fire Insurance Company ("Mt. Vernon"), asks this Court to decline to accept discretionary review of the Court of Appeals decision.

II. Response to Petitioners' Issues Presented for Review

1. This Court should not grant review to consider whether the timing of an insured's fraudulent conduct affects whether the insured is precluded from bringing any extra-contractual claims because (1) the Court of Appeals decision merely clarifies well-settled law, and (2) public policy dictates that insureds should not be able to engage in fraudulent "self-help" for alleged bad faith conduct when they have legal avenues available to them.

III. Statement of the Case

Petitioner Joel Johnson ("Johnson") had a homeowner's property insurance policy with Mt. Vernon. Johnson sued Mt. Vernon in this action to recover under that policy following a fire at his residence. The trial court granted Mt. Vernon's motion for judgment as a matter of law finding that Johnson's admitted creation of a counterfeit lease with false terms and forged signatures, which was discovered shortly before trial, barred any further recovery under the policy or for extra-contractual damages. CP 1655-62.

The undisputed false terms included misnaming his renters (Pete and Evon Little instead of Dean Little and Yvonne Mokihana Calizar), substantially overstating the amount of monthly rent ($1,800 per month

instead of $750 per month), and lying about the term of the lease (May 2008 to November 2008 instead of May 2008 to March 2009) and the portion of the residence being rented (the large main portion of the home, not the small basement apartment). CP 1657-62.

Johnson appealed, arguing that his extra-contractual claims should not be barred in situations where an insurer allegedly commits bad faith prior to an insured's admitted fraud. The Court of Appeals properly affirmed the trial court's decision in a September 16, 2013 unpublished opinion, 2013 WL 5288167. In its opinion, the Court of Appeals thoroughly addressed, in turn, each of Johnson's contentions, finding them unpersuasive. The decision was subsequently published on January 15, 2014.

IV. Summary of Argument

Discretionary review is not appropriate under RAP 13.4(b)(4),[1] because although an insurer's bad faith conduct is certainly an issue of substantial public interest, this Court has already addressed the situation present in the instant case. In *Mutual of Enumclaw v. Cox,*[2] this Court held that an insured's fraudulent conduct precludes any recovery for extra-contractual claims such as bad faith or violations of the Consumer Protection Act ("CPA").

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[1] We note that this is the only subsection of RAP 13.4(b) under which Johnson argues his Petition should be granted.

[2] 110 Wn.2d 643, 757 P.2d 499 (1988).

Additionally, this Court in *Cox* previously determined that "the purpose of the CPA will not be served by awarding damages, attorney fees, and costs to Cox after he tried to perpetrate a fraud on MOE." Allowing insureds who get caught defrauding their insurance companies to be able to recover such damages would only serve to encourage insureds to engage in fraudulent self-help whenever they unilaterally determine that their insurer has violated an insurance regulation or acted in bad faith.

V. Argument

A. This Court Should Not Grant Review Because the Court of Appeals Decision Merely Clarifies Well-Settled Law

Johnson argues that the Court of Appeals decision raises an issue of substantial public interest because it rewards insurance companies for acting in bad faith. Although an insurer's bad faith claim handling is clearly an issue of substantial public interest, this Court has already addressed the situation present here where an insured commits insurance fraud, but attempts to recover extra-contractual damages based on the alleged bad faith conduct of an insurer.

Mutual of Enumclaw v. Cox stands for the proposition that an insured who intentionally misrepresents material facts during the course of an insurance claim is precluded from recovering under the insurance policy or any extra-contractual damages for bad faith or violations of the Consumer Protection Act. In his petition, Johnson disingenuously argues that no Washington court has ever applied *Cox* to preclude extra-

contractual claims where the insurer's alleged bad faith conduct precedes an insured's fraud. However, Johnson appears to have not considered the facts of *Cox* in reaching this conclusion.

In *Cox*, Mutual of Enumclaw ("MOE") brought a declaratory judgment action against Mr. Cox seeking a judgment that it had no duty to pay contractual damages to him because he had severely inflated a personal property inventory of items allegedly destroyed in a fire. Mr. Cox brought counterclaims that MOE had acted in bad faith and violated Washington's insurance regulations by, among other things, failing to aid him in filling out his inventory of certain personal property. *Cox*, 110 Wn.2d at 650. This alleged WAC violation necessarily would have preceded Cox's fraudulent conduct because Mr. Cox's misrepresentations were contained on the very document upon which he alleges that his insurer failed to assist him with. Thus, Mr. Cox's fraud clearly came after the insurer's alleged bad faith conduct – yet the court allowed the insurer to rely on a fraud defense and precluded all of Cox's extra-contractual claims against the insurer. Moreover, the *Cox* court considered and rejected the same argument being made in this case – that the insurer somehow induced the insured to commit insurance fraud. *Id.*

Johnson's statement that no Washington court has ever applied *Cox* retroactively to alleged bad faith conduct which precedes an insured's fraud is incorrect as the *Cox* court did exactly that. Given the factual allegations in *Cox*, *i.e.*, the initial failure of MOE to assist Mr. Cox with his inventory and the subsequent intentional misrepresentations made by

Mr. Cox, the timing of an insured's fraud has no bearing on whether he can maintain bad faith and CPA claims so long as they were made in the claim process. This rule was eloquently stated in *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 415, 36 P.3d 1065 (2001): "in the interests of discouraging insurance fraud, the court held that fraud at any point in the claims process voids the entire contract, whether or not relied on by the insurer."

The Court of Appeals decision merely clarifies *Cox* by explicitly rejecting Johnson's argument that he should not be precluded from maintaining extra-contractual claims because the insurer's alleged bad faith conduct preceded his fraud. Thus, while an insurer's bad faith conduct is certainly an issue of substantial public interest, this Court in *Cox* squarely addressed the issue. Consequently, there is no need for the Court to revisit the same issue.

B. The Public Policy of Punishing and Deterring Insurance Fraud Outweighs the Public Policy of Deterring an Insurer's Bad Faith Conduct

Johnson argues that the Court of Appeals decision "diminishes the rights of insurance customers, it will reward (sic) insurance companies for acting in bad faith, and it will encourage (sic) companies to wrongfully accuse their customers of fraud." While these are certainly valid public policy concerns, they apply equally to the holding in *Cox,* where this Court previously determined that such concerns did not outweigh the

public policy of punishing and deterring insurance fraud. As stated in *Cox:*

> Cox contends that a finding of fraud should not preclude his recovery of damages for MOE's Consumer Protection Act (CPA) violation based on its bad faith and failure to comply with Washington Administrative Code provisions. Cox asserts that allowing the insurer to escape liability under the CPA would be catastrophic for the consumer and the that the CPA's purpose is to protect insureds from actions such as MOE's bad faith.
>
> However, the purpose of the CPA will not be served by awarding damages, attorney fees, and costs to Cox after he tried to perpetrate a fraud on MOE. Furthermore legal mechanisms exist to punish insurers guilty of CPA violations since insurers are subject to the enforcement powers of the State Insurance Commissioner. We consider this regulation by the Insurance Commissioner to be an adequate deterrence against bad faith by insurance companies. We need not further punish MOE when to do so would provide a windfall to one guilty of fraud.[3]

The determination that the policy of punishing and deterring insurance fraud outweighs the policy of punishing and deterring bad faith conduct makes sense. First, an insurer can act in bad faith by mere negligence. However, an insured committing insurance fraud must act

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[3] *Cox,* 110 Wn.2d at 652.

intentionally. Put in this context, it is illogical to place more importance on deterring bad faith conduct than insurance fraud.

Moreover, to allow an insured to recover extra-contractual damages after he has committed insurance fraud would encourage an insured to engage in fraudulent self-help if he believed his insurer had violated a mere insurance regulation such as belatedly responding to a communication from an insured or failing to properly explain a coverage. The remedy of fraudulent self-help to combat alleged bad faith conduct is akin to using a hammer to kill a flea and is clearly not appropriate.

This is especially true because insureds already have multiple *legal* vehicles for combatting bad faith conduct. Insureds are free to sue insurers who allegedly commit bad faith without engaging in fraudulent self-help. Insureds can sue for bad faith, violations of the CPA and insurance regulations, violations of IFCA, and negligence. If insurers act particularly egregious, insureds can sue for fraud, intentional infliction of emotional distress, outrage or even report criminal conduct to law enforcement, if necessary. Simply put, if an insured feels that his insurer is not properly adjusting the claim or has somehow acted in bad faith, he must bring suit, not commit insurance fraud. Consequently, Johnson's argument that public policy dictates his recovery of extra-contractual damages after committing insurance fraud is misplaced.

VI. Conclusion

For the reasons stated above, Mt. Vernon respectfully requests that the Court deny the Petition.

DATED and respectfully submitted this 24th day of February, 2014.

BETTS PATTERSON & MINES, P.S.

By: _____

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CERTIFICATE OF SERVICE

I, Karen Langridge, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is 701 Pike Street, Suite 1400, Seattle, Washington 98101-3927.

2) On February 24, 2014, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Answer to Petition for Review; and**
- **Certificate of Service.**

Counsel for Plaintiff: Joel B. Hanson Law Offices of Michael T. Watkins 2825 Eastlake Avenue East, Suite 115 Seattle, WA 98102	☐ ☒ ☐ ☒	U.S. Mail Hand Delivery Telefax E-mail
Counsel for Safeco: David M. Jacobi Shawnmarie Stanton Wilson Smith Cochran Dickerson 901 Fifth Avenue, Suite 1700 Seattle, WA 98164-2050	☐ ☒ ☐ ☒	U.S. Mail Hand Delivery Telefax E-mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of February, 2014.

Karen Langridge

Karen Langridge

OFFICE RECEPTIONIST, CLERK

From: Karen Langridge <klangridge@bpmlaw.com>
Sent: Monday, February 24, 2014 11:00 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Johnson v. Safeco Ins. and Mount Vernon Fire Ins. Co.; No. 89845-6
Attachments: BPMDOCS-#676594-v1-PLD_Mt_Vernon_Answer_to_Petition_for_Review.PDF

Please file the attached Answer to Petition for Review in Johnson v. Safeco, et al., Cause No. 89845-6. This filing is on behalf of Jeffrey S. Tindal, WSBA #29286, of Betts, Patterson & Mines, P.S., 701 Pike Street, Suite 1400, Seattle, WA 98101, phone 206.292.9988, email jtindal@bpmlaw.com.

Thank you,

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