No. 89845-6

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

JOEL JOHNSON.

Petitioner/Appellant,

v.

SAFECO INSURANCE COMPANY OF AMERICA, an insurance company, and MOUNT VERNON FIRE INSURANCE COMPANY, an insurance company,

Respondents.

PETITION FOR REVIEW

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

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IDENTITY OF PETITIONER

Petitioner/Appellant/Plaintiff Joel Johnson asks this Court to accept review of the decisions terminating review.

CITATION TO COURT OF APPEALS DECISION

Johnson seeks review of the September 26, 2013 decision by the Court of Appeals, Division I, Case No. 68029-3-I, that affirmed the trial court's summary judgment dismissal of Johnson's claims against Safeco and CR 50 dismissal of Johnson's Consumer Protection Act ("CPA") and bad faith claims against Mount Vernon. (Appendix A.) Johnson also seeks review of the December 20, 2013 Order denying his motion for reconsideration. (Appendix B.) The decision was published on January 15, 2014. (Appendix G.) This petition for review is timely because it is filed within 30 days of the January 15 order granting publication. RAP 13.4(a).

ISSUES PRESENTED FOR REVIEW

1. When an insurance company breaches its duty of good faith, violates the Consumer Protection Act, and injures an insurance customer, but 10 months later the customer makes a material misrepresentation that does not harm the insurance company, is the customer barred from any remedy for the violations that preceded the misrepresentation?

2. Where a mortgage company is responsible for paying a customer's insurance premium and makes a payment error, and where the customer's insurance company fails to comply with statutory and contractual provisions that require it to send a notice of nonpayment to the mortgage company prior to any cancellation, and where this results in the inadvertent cancellation of the customer's insurance policy prior to a fire, does the customer have a remedy against the insurance company?

STATEMENT OF THE CASE

A. Safeco Failed to Notify Johnson's Mortgage Company Prior to Cancelling Johnson's Policy

Johnson's house was destroyed by a fire on January 25, 2009. (CP 117.) Johnson had a homeowner's insurance policy contract with Safeco during the 25 years leading up to that date. (CP 118 at ¶ 3.)

In 2008, the year prior to the fire, Johnson refinanced his mortgage with Taylor, Bean, & Whitaker Mortgage Corporation ("Taylor Bean"). (CP 118 at ¶ 4.) Taylor Bean required Johnson to pay his Safeco insurance premium into an escrow account held by Taylor Bean so that it could ensure he was current with Safeco at all times. (CP 118 at ¶ 4.) Accordingly, Taylor Bean was fully responsible for redirecting Johnson's

premium payments to Safeco. (CP 118 at ¶ 4.)

On September 28, 2008, Safeco mailed Johnson a renewal policy that stated it would become effective on November 17, 2008. (CP 41 at ¶ 2; CP 46-52.) The renewal policy named Taylor Bean as the mortgagee (CP 48) and a copy of the policy was sent to Taylor Bean. (CP 41 at ¶ 2.) In response, Taylor Bean sent Safeco a batch payment on behalf of Johnson and other Taylor Bean customers who had policies with Safeco. (CP 113.) But that payment was later stopped due to some unknown error. (CP 116.) Safeco did not notify Taylor Bean of the payment error or request another check. (*See* CP 41-43.)

Instead of notifying Taylor Bean, Safeco sent Johnson a letter on December 2, 2008 notifying him that it had not received payment from him and that his coverage would be terminated if he did not send payment by January 5, 2009. (CP 41 and 54.) Johnson never saw that letter and was unaware of the payment error. (CP 118 at ¶ 5.) Even if he had seen that letter, it would have been reasonable for him to expect that Taylor Bean would correct its payment error as soon as it was notified by Safeco. But no such notification letter was sent to Taylor Bean. (*See* CP 41-43.) As a result, Taylor Bean did not correct its payment error.

This failure to notify Taylor Bean breached the terms of the insurance policy contract with Safeco. The policy provided:

> If the policy is cancelled or not renewed by us, the mortgagee will be notified at least 20 days before the date cancellation or nonrenewal takes effect.

(CP 50.) This failure to notify Taylor Bean also violated a Washington statute. RCW 48.18.290(1)(a)(ii) requires that an insurance company send a cancellation notice that states "the insurer's actual reason for cancelling the policy." If the cancellation is for nonpayment, that notice must be sent at least 10 days prior to the effective date of cancellation. RCW 48.18.290(1)(c). The statute further provides: "Like notice must also be so delivered or mailed to each *mortgagee*, pledgee, or other person shown by the policy to have an interest in any loss which may occur thereunder." RCW 48.18.290(1)(e) (emphasis added).

Finally, on January 11, 2009, Safeco sent Taylor Bean a "Notice of Cancellation." (CP 58.) But the notice was too late because it stated that the cancellation date was February 5, 2009. (CP 58.) Johnson's house was destroyed by an accidental fire on January 25, 2009, which was 11 days prior to the cancellation date. (CP 117.)

When Johnson contacted Safeco, it told him that his policy had been cancelled and there was no coverage. (CP 43 at ¶ 8 and CP 2021.) This cancellation could have been avoided if Taylor Bean had been timely notified pursuant to the contract and Washington law.

The purported lack of insurance triggered coverage under a "lender-

placed" insurance policy contract between Taylor Bean and Mount Vernon. (CP 1989 at ¶ 6.) That policy had been purchased by Taylor Bean on February 1, 2008, almost a year before the fire, and covered all Taylor Bean's mortgage properties in the event that the homeowner had not purchased a primary insurance policy. (*See* CP 197.)

B. Mount Vernon Acted in Bad Faith when it Wrongfully Canceled Payment to Johnson, Delayed Payment for Nine Months, and Waited Two Years to Finally Pay the Full Amount it Owed for the Structure Damage

It is undisputed that Johnson was a beneficiary of the Mount Vernon policy and was insured for the fire damage. (*See* CP 322 at line 3, VRP 51 at lines 5-12.) Accordingly, Mount Vernon owed him a duty of good faith and was required to pay for the cost of repairing his home. On February 25, 2009, one month after the fire, Mount Vernon sent Johnson a payment of $131,125 for the cost of repairing his house. (*See* CP 323.) But it did not honor this payment.

On March 4, 2009, Mount Vernon learned that Safeco's policy might have been effective at the time of the fire. (CP 324 at ¶ 2.) As a result, Mount Vernon immediately cancelled its payment to Johnson for the structure repairs. (CP 324 at ¶ 3.)

Two months later, on May 27, 2009, a Mount Vernon employee named Maureen Connor told Johnson that the cost for the structure repair

was still "being handled by us and Safeco." (CP 307; CP 328 at ¶ 1.) Mount Vernon refused to make any payment for the cost of structure repairs until October of 2009. (CP 318.) This was nine months after the fire.

On July 6, 2010, which was 17 months after the fire, Mount Vernon finally agreed that its original estimate was wrong and that the actual cost to repair the house was approximately $204,442. (CP 342 at ¶ 4-5.) This was $70,000 more than Mount Vernon's original estimate of $133,041. (CP 323 at ¶ 2.) Mount Vernon did not issue the supplemental payment for the cost of repairs until February 9, 2011—a full two years after the fire. (CP 373; *see also* CP 342 at ¶ 5.) As a result of these extensive delays, Johnson's house was never repaired. (CP 1991 at ¶ 13.)

Mount Vernon's failure to timely pay Johnson for the structure repairs breached its duty of good faith. The delay was unreasonable and placed Mount Vernon's interests above Johnson's. An insurer is liable for bad faith if its actions were unreasonable, frivolous, or unfounded. *Mut. of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, 916, 169 P.3d 1 (2007). Additionally, an insurer acts in bad faith when it places its own interests above the interests of its insured. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386, 715 P.2d 1133 (1986). Mount Vernon's delay also violated the CPA because any breach of the duty of good faith constitutes a *per se* violation of the CPA. *Salois v. Mut. of Omaha Ins. Co.*,

90 Wn.2d 355, 359, 581 P.2d 1349 (1978).

C. *Johnson Fabricated a Lease Because Mount Vernon Incorrectly Told Him He Needed a Lease to Receive ALE Coverage*

Around November 2009, about 10 months after the fire, Johnson fabricated a written lease based on his misguided belief that such a written document was necessary for Mount Vernon to pay him for his additional living expenses. (CP 832-33; *see also* CP 385-86.) Johnson did this without the knowledge of his attorneys. As discussed below, this fabrication would not have occurred but for Mount Vernon's failure to comply with the insurance regulations.

At the time of the fabrication, Johnson was emotionally vulnerable and was in a desperate financial situation. Emotionally, Johnson was still recovering from Post-Traumatic Stress Disorder as a result of his narrow escape from the fire.[1] (CP 2021.) Financially, Johnson had very little income (CP 1992 at ¶ 18; CP 119-120 at ¶ 10) and he was struggling to make

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[1] Johnson was diagnosed with symptoms of Post-Traumatic Stress Disorder resulting from the fire. (CP 2021.) The fire spread throughout his home (CP 323 at ¶ 2.) and Johnson might not have escaped the fire but for the assistance of his neighbor. (CP 1989 at line 1; *see also* CP 2021.)

payments on two mortgages.[2] (CP 1992 at ¶ 19.) Along with the structure of his house, most of his personal belongings had been destroyed in the fire. (*See* CP 1991 at ¶ 17.) While waiting for Mount Vernon to pay for the structure repairs, Johnson exhausted his retirement savings and could not afford the additional living expenses caused by the fire. (CP 1992 at ¶ 18-20.) Johnson was forced to seek assistance from the Department of Social and Health Services in order to buy food. (CP 1992 at ¶ 18-20.)

Like other homeowner insurance policies, the Mount Vernon policy provided coverage for the additional living expenses (ALE) incurred by a homeowner in order to maintain his or her normal standard of living. (CP 261 at D.1.) Such ALE would include the cost of renting another house until the damaged house was repaired. (*See id.*)

But Mount Vernon failed to properly inform Johnson about his ALE coverage. Immediately after the fire, Johnson told Mount Vernon representative Tony Brown that Johnson had moved into his own rental property. (CP 1190 at line 2.) Brown told Johnson that it was fine to live there. (CP 1190 at line 3; *see also* CP 1174.) But on May 27, 2009, four months after the fire, Mount Vernon told Johnson that it would not

[2] In addition to the mortgage on the home that was destroyed by the fire, around 2008 he had inherited his mother's house and the corresponding mortgage. (*See* CP 1992 at ¶ 18-19 *and* CP 482-483 at pages 5-7.)

compensate him for the cost of living in his *own* rental property. (CP 328 at ¶ 1.) Mount Vernon took the position that living in his own rental property did not constitute an increase in expenses under the policy language.[3] (CP 328 at ¶ 5.) In other words, Johnson should have moved into a rental property owned by someone else in order to receive payment for his ALE coverage.

All three of Mount Vernon's agents testified that Johnson was wrongfully allowed to believe that he would be compensated for the cost of living in his own rental home. (CP 1048, 1174, 1179-81.) This occurred because Brown had no authority to discuss the parameters of coverage with Johnson. (CP 1174-75.)

Washington insurance regulations specified that Mount Vernon was required to inform Johnson that this ALE coverage was available:

> No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

WAC 284-30-350(1). Further, Mount Vernon was required to provide Johnson with instructions for utilizing that ALE coverage:

> Upon receiving notification of a claim, every insurer must promptly provide necessary claim forms, instructions, and reasonable assistance so that first party claimants can comply with the policy conditions and the insurer's reasonable requirements.

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[3] This is in spite of the fact that, due to his occupancy of it, Johnson was unable to rent the residence in which he was staying.

WAC 284-30-360(4).[4]

After failing to properly explain the ALE coverage, Mount Vernon refused to pay Johnson any money for his additional living expenses. (CP 329 at ¶ 1.) In response, Johnson accused Mount Vernon of "misrepresenting" the policy provisions. (CP 329 at ¶ 1.) Recognizing its mistake, on May 29, 2009, Mount Vernon agreed to pay Johnson $1,250 a month for additional living expenses. (*Id.* at ¶ 5.) Mount Vernon noted that "we will owe more" for the future months. (*Id.*)

Mount Vernon never made another ALE payment. When Johnson asked James Ziff, a Mount Vernon employee, for the unpaid ALE on September 21, 2009, Ziff refused to pay him any additional money. (CP 332 at ¶ 2.) Ziff had previously told Johnson that Mount Vernon was not obligated to pay him any money for ALE because "You didn't have [the house] rented, and you didn't document that you could have had it rented." (CP 1170 at line 10.) Connor had also informed Johnson that his rental house did not appear to be covered because "there is no way for him to prove the rental would have been occupied by paying tenants" and "there was no

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[4] A single violation of these WAC regulations constituted an unfair or deceptive act or practice under the CPA. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 331, 2 P.3d 1029 (2000) citing *Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 924, 792 P.2d 520 (1990).

lease/agreement that was cancelled due to the loss." (CP 328 at ¶ 7-8.)

Finally, around November 2009, about 10 months after the fire, Johnson fabricated a written lease to prove that renters had lived in his rental home. (CP 832-33; *see also* CP 385-86.) While Johnson did have tenants living in his rental house, they never actually signed a written lease with Johnson and the rent they paid was less than Johnson claimed. (CP 1189-90.) The submission of the fabricated lease proved to be inconsequential. After Mount Vernon reviewed the lease, it still refused to make any additional ALE payments. (CP 388-90.) Accordingly, the fabricated lease did not harm Mount Vernon in any way.

D. Procedural History

On January 7, 2011, the Superior Court granted Safeco's motion for summary judgment and dismissed all claims against Safeco on the basis that the policy had been properly cancelled. (CP 156-57.) On the first day of trial, the Superior Court granted Mount Vernon's CR 50 motion to have all Johnson's claims dismissed. (VRP 121-24; *see also* CP 1656.) The claims against Mount Vernon were dismissed solely on the basis that Johnson had fabricated the lease 10 months after the fire. (*Id.*) Though it granted Mount Vernon's motion, the Superior Court later acknowledged that "Mount Vernon delayed payment of this claim for a lengthy period, and [committed] CPA violations." (CP 1984 at ¶ 1.)

The Court of Appeals decision affirmed the dismissal of all claims against Mount Vernon. (Appendix A.) The decision rejected Johnson's argument that the fabricated lease should not have a retroactive effect on the bad faith and CPA violations that preceded it. (Appendix A at 16.)

The Court of Appeals decision also affirmed the dismissal of all claims against Safeco. The Court of Appeals found that Johnson's interest in the policy was not protected by the contractual and statutory notice provisions pertaining to the mortgagee. (Appendix A at 7.)

Safeco and Mount Vernon both moved for the publication of the decision. (Appendix D and E.) Though they were not parties, Allstate Insurance Company and Farmers Insurance Company of Washington also filed a joint-motion to publish. (Appendix F.) The decision was published on January 15, 2014. (Appendix G.)

ARGUMENT CONCERNING MOUNT VERNON

Concise Statement Concerning Mount Vernon

The Appellate Court's decision should be reviewed because it is the first case where a court has retroactively barred an insured from seeking a remedy for bad faith and CPA violations that occurred prior to a fraud or misrepresentation. The decision diminishes the rights of insurance customers, it will reward insurance companies for acting in bad faith, and it will encourage insurance companies to wrongfully accuse their

customers of fraud.

A. The Court of Appeals Decision Concerns an Issue of Substantial Public Interest Because It Rewards Insurance Companies for Acting in Bad Faith

An issue of substantial public importance exists here because the Court of Appeals decision rewards an insurance company that acts in bad faith. Review by the Supreme Court is proper under RAP 13.4(b)(4).

The decision is the first time that any court has ruled that fraud or misrepresentation by an insured has such an absolute, retroactive effect. The decision will have a wide-ranging effect on how insurance companies handle insurance claims. In the subject case, Mount Vernon wrongfully withheld payment and put enormous financial pressure on Johnson during a time of desperate need. This pressure ultimately led him to make the foolhardy decision to fabricate a lease. The Court of Appeals decision rewards Mount Vernon for its bad faith behavior.

Insurance companies are rational actors. They are profit-motivated entities and their behavior is determined by an actuarial evaluation of the costs and benefits of potential business strategies. If Washington diminishes the remedies afforded to customers, insurance companies will alter their behavior accordingly. For example, insurers might under-staff their Washington offices if they believe that there is a lower risk of being penalized for mishandling claims.

If an insurance company can avoid all liability for its bad faith conduct by showing that its customer made a misrepresentation in response to its bad faith, insurance companies will have a perverse incentive to mistreat vulnerable customers and accuse them of lying. If, during a claim, an insurer learns that its own employees have committed bad faith and litigation is imminent, its best defense may be to "declare war" on its customer in order to escalate the dispute and increase the possibility that the insured will make a misrepresentation.

B. This Issue Has Never Before Been Addressed by a Court

The Court of Appeals decision is based on *Mut. of Enumclaw Insurance Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988). *Cox* enforced policy language that voided coverage when an insured materially misrepresented their insurance claim. *Cox* also found that an insured who makes a misrepresentation or fraud should be barred from suing his or her insurance company for extra-contractual claims such as bad faith and violations of the CPA. While Johnson's case involves a fabricated document, *Cox* also applies to oral misrepresentations and *Cox* is invoked in every bad faith case where the insurer accuses its insured of a lie.

Until now, no Washington court has ever applied the *Cox* rule retroactively. As Safeco explained in their Motion to Publish, the issue presented is novel and "this is the first Washington decision on this point."

(Appendix D at 4.) Mount Vernon agreed and explained:

> While [*Cox*] clearly states that misrepresentations made during the claim process bar coverage, **it does not address the situation where there is alleged bad faith conduct which precedes the misrepresentations**. Publishing this decision will clarify *Cox* to include such situations as this where an insured alleges that he was forced to act fraudulently by an insured's alleged bad faith conduct.

(Appendix E at 4.) (Emphasis added.) The Court of Appeals decision appears to be the first time that any court, in any jurisdiction, has given a retroactive effect to the rule expressed in *Cox*.

C. Traditionally, Washington Contract Law Places Great Emphasis on the Timing of Breaches

Washington has long held that the timing of a contractual breach is essential to the analysis of any contract dispute. After one party materially breaches a contract, the other party has the right to withhold further performance. *Rosen v. Ascentry Technologies, Inc.*, 143 Wn. App. 364, 369, 177 P.3d 765, 767 (2008). "A party is barred from enforcing a contract that it has materially breached." *Id.* citing *Bailie Communications, Ltd. v. Trend Bus. Sys.,* 53 Wn. App. 77, 81, 765 P.2d 339 (1988) ("material failure by one party gives the other party the right to withhold further performance"). Correspondingly, the failure to make a timely payment is a material breach that discharges the other party's duties under

the contract. *Jacks v. Blazer*, 39 Wash. 2d 277, 286, 235 P.2d 187, 192 (1951); *see also 224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 281 P.3d 693 (2012).

The rule established by *Cox* arises from the terms of the insurance contract. Under well-settled Washington law, Mount Vernon's breach of the duty of good faith should not be absolved by Johnson's breach, the fabrication of the lease, which occurred many months later. Instead, Mount Vernon's breaches should bar it from enforcing the contract concerning Johnson's subsequent misrepresentation. Contrary to the Court of Appeals decision, timing does matter.

D. Civil Actions by Customers are the Only Way to Hold Insurance Companies Accountable and Discourage Bad Faith

The Office of the Insurance Commissioner has testified that it does not have the authority or resources to prosecute insurers such as Mount Vernon for their wrongful conduct in individual claims. (CP 1350-51.) As a result, actions by customers such as Johnson are the *only* mechanism that exists to hold insurers accountable when they commit bad faith and violate the insurance regulations. The Court of Appeals decision to expand *Cox* and apply it retroactively will allow more insurance companies to avoid accountability regardless of how egregious their conduct.

E. The Insurance Industry is Watching this Case Closely

The Court of Appeals decision has attracted the attention of several major insurance companies who are not parties to this matter. Both Allstate Insurance Company and Farmers Insurance Company of Washington filed a joint-motion to publish the Court of Appeals decision. (Appendix F.) These companies recognize this issue will arise in future cases. The outcome of this case will influence how they handle claims.

ARGUMENT CONCERNING SAFECO

Concise Statement

The Court of Appeals decision concerning Safeco should be reviewed because it undermines the purpose of the statute which requires notice prior to the cancellation of an insurance policy. Customers who are dependent on their mortgage company for the payment of their insurance premium should have a remedy if their policy is cancelled as a result of their insurance company's failure to notify their mortgage company of a payment error.

A. The Court of Appeals Decision Concerns an Issue of Substantial Public Interest Because it Weakens the Statutory Notice Requirement for Insurance Policy Cancellations

An issue of substantial public importance exists here that justifies review by the Supreme Court. RAP 13.4(b)(4). The Court of Appeals

decision holds that a homeowner's interest in an insurance policy is not protected by contractual and statutory requirements that the mortgagee be notified prior to any cancellation. This decision will have a broad impact because it is often the mortgagee, and not the homeowner, who is responsible for paying the insurance premium to avoid cancellation.

It is common for homeowners to have mortgage contracts that require the homeowner to pay their insurance premium to their mortgagee who, in turn, pays the premium to the insurance company that covers the house. This allows the mortgagee to control the risk that the homeowner might fail to make an insurance premium payment. This arrangement makes the homeowner completely dependent on the mortgagee to timely pay the insurance premium. Accordingly, the homeowner should be protected by any statutory and contractual requirements that the mortgagee be notified prior to any cancellation.

Under Washington law, the cancellation of a policy must be done in accordance with state law in order to be effective. *Olive Corp. v. United Capitol Ins. Co.*, 147 Wn.2d 148, 161-163, 52 P.3d 494 (2002) (where insurer failed to give notice of cancellation as required by statute, the cancellation was ineffective). Similarly, the cancellation of a policy must be in accordance with the provisions of the insurance policy to be effective. *Id.* quoting *Blomquist v. Grays Harbor County Med. Serv.*

Corp., 48 Wn.2d 718, 721, 296 P.2d 319 (1956). Like many insurance policies, Johnson's policy with Safeco required that Safeco notify the mortgagee prior to cancellation. In addition to this contractual requirement, RCW 48.18.290 requires that the mortgagee be notified prior to cancellation. It is undisputed that Safeco failed to timely notify Taylor Bean of the cancellation prior to the date of the fire. Because Safeco's cancellation failed to comply with the statute or the insurance contract, that cancellation should not have been effective on during the January 25, 2009 fire. Safeco's denial of coverage was wrongful.

However, the Court of Appeals decision found that Safeco's cancellation was proper. The decision explained:

> Next, Johnson claims that because Safeco did not properly notify TBW, the policy was in effect as to both TBW and himself on January 25, 2009. We disagree.
>
> Under the terms of the policy, TBW had a separate interest.

(Appendix A at 7.) In other words, the Court of Appeals found that the mortgagee had a separate interest in the policy and that Johnson was not protected by the statutory or contractual language that required Safeco to notify the mortgagee prior to cancellation.

The decision undermines the effectiveness of RCW 48.18.290. The Washington Supreme Court has explained that statute is meant to protect insureds from inadvertent cancellations. *Olivine*, 147 Wn.2d at 162, 166.

"The purpose of the notice requirements in the insurance code is to enable the insureds—all of them—to take appropriate action in the face of impending cancellation of an existing policy." *Id.*; *see also Certification from United States Court of Appeals for Ninth Circuit in Cornhusker v. Kachman*, 165 Wn.2d 404, 411, 198 P.3d 505 (2008). Mortgagees commonly require that homeowners relinquish responsibility for the payment of insurance premiums and allow the mortgagee to undertake that duty. This means that notice to the mortgagee is at least as important as notice to the homeowner. The notice requirements of RCW 48.18.290 should be construed to protect homeowners in the event of payment errors by the mortgagees.

CONCLUSION

The Court of Appeals decision should be reviewed because it diminishes the rights and protections afforded to insurance customers. Upon review, Johnson respectfully requests that this Court reverse the dismissal of his claims against Safeco and reverse the dismissal of his bad faith and CPA claims against Mount Vernon.

RESPECTFULLY SUBMITTED this 21st day of January, 2014.

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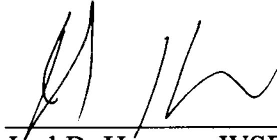

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CERTIFICATE OF SERVICE

I certify that I caused to be served a copy of the foregoing PETITION FOR REVIEW on this 22nd day of January, 2014, to the following counsel of record at the following addresses:

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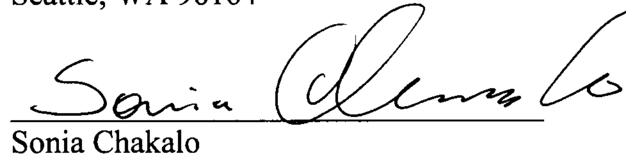

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOEL JOHNSON, a single person, Appellant, v. SAFECO INSURANCE COMPANY OF AMERICA, an insurance company; MOUNT VERNON FIRE INSURANCE COMPANY, an insurance company, Respondents, TAYLOR, BEAN & WHITAKER MORTGAGE CORP., a Washington corporation, Defendant.	No. 68029-3-I DIVISION ONE UNPUBLISHED OPINION FILED: September 16, 2013

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STATE OF WASHINGTON
2013 SEP 16 AM 9: 05

SCHINDLER, J. — Joel Johnson appeals summary judgment dismissal of his claims against Safeco Insurance Co. and the order granting the CR 50 motion to dismiss his bad faith claim and claims against Mount Vernon Fire Insurance Co. under the Consumer Protection Act (CPA), chapter 19.86 RCW. We affirm.

FACTS

The material facts are not in dispute. Joel Johnson owned a house in Edmonds located at 5703 145th Street Southwest and had a "Quality-Plus Homeowners Policy" with Safeco Insurance Co. On July 22, 2008, Johnson refinanced the Edmonds house

with Taylor Bean & Whitaker Mortgage Corp. (TBW). TBW assumed responsibility for paying the insurance premium from the escrow account.

Johnson also owns rental property located at 9036-38 4th Avenue Southwest in Seattle. The rental property is a duplex with an upstairs unit of approximately 2,500 square feet and a small basement apartment of approximately 1,000 square feet. The mortgage payments for the rental property were $1,800 a month.

On September 28, 2008, Safeco sent TBW and Johnson a renewal notice for the upcoming 12-month policy period of November 17, 2008 to November 17, 2009. In October, TBW sent Safeco a check for the premium amount due to renew the policy. But TBW stopped payment on the check and did not reissue another check to pay for the premium.

On December 2, Safeco sent Johnson an expiration notice. The notice states that Safeco had not received the renewal premium from the mortgage company. The notice gave Johnson until January 5, 2009 to send Safeco the premium to "keep your policy in effect." Neither Johnson nor TBW paid the premium to renew the homeowners' insurance policy.

On January 11, 2009, Safeco sent a notice of cancellation to TBW stating that the mortgage company's interest in the policy would be cancelled on February 5. At some point after receipt of the notice of cancellation from Safeco, TBW obtained a "lender placed" homeowners' insurance policy for Johnson's house with Mount Vernon Fire Insurance Co. The policy was effective from November 17, 2008 to November 17, 2009.

On January 25, 2009, the chimney in Johnson's house caught fire. The fire

destroyed the house and personal property. Johnson moved into his rental property in Seattle.

When Johnson contacted Safeco, Safeco told him the policy expired because the premium was not paid. TBW informed Johnson that the Mount Vernon policy would cover the fire-related structure repairs, damaged personal property, and additional living expenses (ALE).

Johnson submitted a claim to Mount Vernon. Mount Vernon assigned Maureen Connor to process the claim. Mount Vernon also retained an independent local adjuster, Tony Brown. Brown inspected the property on February 6. On February 23, Brown submitted an estimate for the structural repairs of $133,041.30, plus an allowance for personal property. On February 25, Mount Vernon authorized payment for the full cost of repair. But after discovering the Safeco policy was in effect as to TBW, Mount Vernon cancelled payment. On April 27, Mount Vernon filed a claim with Safeco.

In early May, Johnson told Brown that he was living in his rental property and the rent was $1,800 a month. Johnson said that he moved into his unoccupied rental "to mitigate his exposure (ALE)."

On May 27, Connor informed Johnson that Mount Vernon needed documentation to support his ALE claim for $1,800 a month in rent. Johnson then sent a letter to Connor stating that "[t]he cost of the house I'm living in is $1,800 per month." In response, Connor told Johnson that "Mt. Vernon needed actual substantive documentation to support his claim."

Connor's supervisor James Ziff concluded that there was no coverage to

reimburse Johnson for lost rent. But when Ziff spoke to Johnson on May 29, Ziff agreed to pay five months of ALE at $1,250 per month. Ziff also agreed to a $5,000 advance for reimbursement of the personal property loss. In August, Johnson contacted Brown to request additional ALE. On September 21, Ziff told Johnson that he had 30 days to provide documentation to support his ALE claim or Mount Vernon would close the claim.

Safeco concluded that TBW was entitled to coverage for the structural damage to Johnson's house. In June, Safeco entered into an agreement with Mount Vernon to pay 51 percent of the structural repair costs. On June 20, Safeco paid its share of its estimate of the actual cash value of the structure.

Mount Vernon asked an independent adjuster to review Safeco's estimate of the structural repair costs. In October, Mount Vernon paid its share of the structure repair cost based on its own estimate.[1] Mount Vernon then closed the claim because Johnson did not submit an inventory of personal property or any documentation to support his ALE claim.

On November 25, an attorney representing Johnson sent a letter to Mount Vernon demanding payment of $18,000 for ALE. The attorney provided Mount Vernon with a lease agreement between Johnson and his previous renters Pete and Evon Little. According to the terms of the lease, the Littles rented the upstairs of the duplex from May 15, 2008 to November 15, 2008 for $1,800 a month. Mount Vernon denied ALE coverage on the grounds that the policy did not cover lost rent.

On December 18, Johnson notified Mount Vernon that he planned to file a claim under the Insurance Fair Conduct Act, chapter 48.30 RCW, for unreasonable denial or

[1] On February 9, 2011, Mount Vernon issued its final payment for the cost of the repairs in the amount of $33,949.40.

delay for ALE payments. Mount Vernon agreed to pay Johnson an additional $1,250 a month for the previous six months.

On May 24, 2010, Johnson filed a lawsuit against Safeco, Mount Vernon, and TBW. Johnson alleged Safeco breached the terms of the insurance policy by failing to provide proper notice to Johnson before cancellation, and refusing to pay him for the structural costs of repair, personal property damage, and ALE. Johnson alleged TBW had a contractual duty "to properly and timely make his insurance payments to avoid any cancellation of his insurance policy" with Safeco. Johnson alleged Mount Vernon breached its contractual duty to pay for the cost of structural repairs, personal property damage, and living expenses. Johnson alleged Mount Vernon also failed "to conduct a reasonable investigation of the fire loss, and fail[ed] to provide for the timely repair and/or rebuilt of his dwelling to its original pre-loss condition with like, kind, and quality materials and professional workmanship."

Johnson also alleged that Safeco and Mount Vernon violated the insurance regulatory provisions of the Washington Administrative Code (WAC); violated the Consumer Protection Act (CPA), chapter 19.86 RCW, and the Insurance Fair Conduct Act, chapter 48.30 RCW; and breached the duty of good faith and fair dealing. After TBW filed for bankruptcy, Johnson voluntarily dismissed TBW without prejudice.

Safeco filed a motion for summary judgment arguing that because Johnson did not pay the premium, the homeowners' policy expired before the fire on January 25, 2009. The court granted the motion for summary judgment. The court ruled, in pertinent part:

> The relevant law here that has to do with renewal of a policy or a cancellation. Either way, Safeco's properly met its obligations here. The

> notices were sent. Mr. Johnson didn't renew the policy.
> I recognize that it may have been the responsibility of [TBW] to do that, but nevertheless, it's not Safeco's fault that the policy wasn't renewed and therefore, Safeco doesn't have any liability here.

The trial on the claims against Mount Vernon was scheduled to begin on October 3, 2011. On August 18, Johnson filed a motion for summary judgment on the breach of contract claim for ALE. Johnson argued that he was entitled to lost rental income of $1,800 a month.

On August 31, Mount Vernon took Johnson's deposition. Johnson testified that Dean Little signed the lease on May 15, 2008 and the Littles rented the upstairs portion of the duplex for $1,800 a month from May 2008 to December 2008. But Johnson later admitted that he had forged the lease and asserted the lease reflected the oral agreement he had with the Littles. Mount Vernon filed an amended answer asserting misrepresentation and fraud as an affirmative defense.

Mount Vernon filed a motion for entry of a judgment as a matter of law to dismiss. In support, Mount Vernon filed the affidavit of Dean Little. Little states that he and his spouse rented the basement apartment of Johnson's duplex from May 2008 to March 2009 for $750 a month, and they did not sign a lease.

On the first day of the scheduled trial, the court granted the CR 50 motion for judgment as a matter of law. The court ruled that "following plaintiff's factual admissions, no legally sufficient basis exists for a jury to find for the plaintiff on his contractual, extra-contractual or CPA claim." The order sets forth in detail the undisputed facts establishing Johnson intentionally misrepresented the terms of the rental agreement that was submitted to obtain ALE. The undisputed findings state, in

pertinent part:

> 2. Mt. Vernon's insurance policy issued to plaintiff contains a clause stating that it provides coverage to no "insureds" if the insured has committed fraud, concealment or misrepresentation of any material fact related to the insurance. (Homeowners 3, condition Q) . . . .
>
> 3. In May 2009, plaintiff submitted a letter to Mt. Vernon requesting that he be paid $1,800 per month in additional living expenses ("ALE").
>
> 4. In November 2009, plaintiff submitted a document entitled "Rental Agreement" to Mount Vernon as evidence in support of his claim for $1,800 per month in ALE under Mount Vernon's policy.
>
> 5. The Rental Agreement states that plaintiff rented a residence to Pete and Evon Little, for a period of six months, beginning May 15, 2008, at a rate of $1,800 per month; the Rental Agreement purports to contain the signatures of plaintiff and Pete Little.
>
> 6. In January 2010, Mt Vernon paid plaintiff additional ALE after this Rental Agreement was submitted to it. Plaintiff subsequently filed suit against Mt. Vernon for further ALE and under various theories of extra-contractual liability.
>
> 7. Plaintiff testified under oath at his deposition that (a) the Rental Agreement was a genuine written agreement between him and Pete and Evon Little, (b) it related to the upper, larger portion of a duplex, specifically, 9036 4th Avenue Southwest, in Seattle, (c) it was signed by Pete Little on May 15, 2008, and (d) that the terms and conditions recited therein were the actual terms and conditions of the agreement he had with Pete and Evon Little.
>
> 8. Whether plaintiff is entitled to ALE in addition to that which was paid prior to litigation has been at issue in this case since the beginning.
>
> 9. The Rental Agreement is a blank legal form which was filled in by plaintiff. The legal form in question did not exist on its purported May 15, 2008 date of execution as one of the pages of the Rental Agreement was not available for sale to the public until 2009. The Rental Agreement cannot be a genuine agreement between plaintiff and Pete and Evon Little.
>
> 10. After being confronted with this evidence, plaintiff conceded that he had fabricated the document. However, he asserted that irrespective of the fabrication, he actually had an oral lease with Pete and Evon Little for the terms and conditions set forth in the Rental Agreement. Specifically, he contended that he had rented the upper part of the duplex, 9036 4th Avenue Southwest, Seattle, to Pete arid Evon Little from May 15, 2008 to some time in December, 2008 for the amount of $1,800 per month.
>
> 11. On September 30, 2011, plaintiff's counsel notified Mt. Vernon's counsel that plaintiff had discovered a box containing the true

names of his renters, which was evidence that they rented from plaintiff. Plaintiff's counsel revealed to Mt. Vernon's counsel, however, that the true names of the renters were Dean Little and Yvonne Mokihana Calizar. On October 2, 2011, Mt. Vernon's counsel was able to locate Mr. Little and Ms. Calizar.

12. Dean Little is also known as Pete Little. Mr. Little testified in an affidavit that he and his wife did rent property from plaintiff, but (a) they rented the downstairs apartment at 9038 4th Avenue Southwest, Seattle, and not the upstairs with the address 9036 4th Avenue Southwest, Seattle; (b) they paid plaintiff $750 per month, not $1,800 per month; (c) they never signed a rental agreement; (d) they lived in the basement apartment from May of 2008 to March of 2009.

13. Plaintiff has not disputed any of the foregoing evidence, and in pleadings filed with the Court, plaintiff's counsel concedes the foregoing evidence.

The court concluded there was no genuine issue of fact for trial, and under the "controlling case law authority, Mutual of Enumclaw Ins. Co. v. Cox, 110 Wn.2d 643[, 757 P.2d 499] (1988) and Onyon v. Truck Ins. Exch., 859 F.Supp. 1338 (W.D. Wash. 1994); [and] Kim v. Allstate[Ins. Co., 153 Wn. App. 339, 223 P.3d 1180 (2009)],"

(1) an insured who makes a material misrepresentation of fact relating to his claim under a policy of insurance that contains a clause voiding specific coverage entirely for the insured's fraud or misrepresentation, is precluded from recovery on that coverage insurance policy;

(2) an insured who makes a material misrepresentation of fact relating to his insurance claim is precluded from maintaining tort causes of action such as bad faith and violation of the Consumer Protection Act.

The court dismissed Johnson's complaint against Mount Vernon with prejudice because he "intentionally misrepresented material facts concerning his insurance claim with Mt. Vernon. [Johnson] is precluded from making any recovery from Mount Vernon by established law."[2]

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[2] The court granted Mount Vernon's motion for sanctions under CR 11 and ordered Johnson to pay $22,500 in attorney fees and costs.

ANALYSIS

Summary Judgment Dismissal of Claims Against Safeco

Johnson contends the court erred in dismissing his claims against Safeco for breach of the insurance contract, bad faith, and violation of the CPA.

When review summary judgment de novo. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c); White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

The interpretation of an insurance contract is a question of law that we also review de novo. Bushnell v. Medico Ins. Co., 159 Wn. App. 874, 881, 246 P.3d 856 (2011). We construe insurance policies in the same manner as contracts. Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 665-66, 15 P.3d 115 (2000). In determining the legal effect of a contract, "a court must construe the entire contract together so as to give force and effect to each clause." Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 797, 881 P.2d 1020 (1994); Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005) (principles of contract interpretation apply to insurance policies). If the language in an insurance contract is unambiguous, the court must enforce it as written and may not modify the contract or create an ambiguity where none exists. State Farm Mut. Auto. Ins. Co. v. Ruiz, 134 Wn.2d 713, 721, 952 P.2d 157 (1998).

Johnson contends the insurance policy for the 12-month period beginning November 17, 2008 became effective when Safeco sent him a copy of the renewal

policy on September 28, 2008. But the renewal notice and express terms of the policy require payment of the premium in order to renew the policy. The September 28 renewal notice states:

> [I]t is now time to renew your Quality-Plus Homeowners policy. . . . Your new policy period begins November 17, 2008. The 12-month premium for this policy is $630.00 for the November 17, 2008 to November 17, 2009 policy term. . . . We have sent a bill for this amount to your mortgage servicing company.

The Safeco homeowners' insurance policy only applies to a loss that occurs during the policy period, and the policy may be renewed "for successive policy periods if the required premium is paid." The policy provides, in pertinent part:

> SECTION I AND II — PROPERTY AND LIABILITY CONDITIONS
>
> 1. Policy Period and Changes.
>   a. The effective time of this policy is 12:01 A.M. at the *residence premises.* This policy applies only to loss under Section I, or *bodily injury* or *property damage* under Section II, which occurs during the policy period. This policy may be renewed for successive policy periods if the required premium is paid and accepted by us on or before the expiration of the current policy period. The premium will be computed at our then current rate for coverage then offered.
>   b. Changes:
>   (1) Before the end of any policy period, we may offer to change the coverage provided in this policy. Payment of the premium billed by us for the next policy period will be your acceptance of our offer.
>   (2) This policy contains all agreements between you and us. Its terms may not be changed or waived except by endorsement issued by us.

The policy also provided that Safeco would pay claims and provide coverage only if the premiums were paid when due:

> INSURING AGREEMENT
>
> In reliance on the information you have given us, we will pay claims and provide coverage as described in this policy if you pay the premiums when due and comply with all the applicable provisions outlined in this policy.

The plain and unambiguous language of the policy requires payment of the premium in order to renew the policy.

Further, the cases Johnson cites do not support the argument that the Safeco policy automatically renewed when Safeco sent him a copy of the policy. In Frye v. Prudential Insurance Co. of America, 157 Wash. 88, 95, 288 P. 262 (1930), the court addressed whether an insurance company was estopped from claiming the policy had expired for late payment when the insurer has a pattern of allowing the insured to make late payments. See also McGreevy v. Or. Mut. Ins. Co., 74 Wn. App. 858, 867, 876 P.2d 463 (1994) (amendments to insurance policy not effective where insured had no notice of the changes); Webster v. State Farm Mut. Auto. Ins. Co., 54 Wn. App. 492, 496, 774 P.2d 50 (1989) (no dispute that policy had been issued).

In the alternative, Johnson claims that mailing the renewal policy to him was an offer followed by acceptance when TBW sent payment of the premium to Safeco. Acceptance of an offer must be identical to the offer or no contract is formed. Sea-Van Invs. Assocs. v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). The plain language of the policy required payment of the premium. Because there is no dispute TBW stopped payment and Johnson never paid the premium, the homeowners' policy was not renewed or in effect at the time of the fire.[3]

Johnson also contends Safeco did not comply with either the policy or the statutory notice requirements. Safeco asserts that because Johnson did not pay the premium to renew the policy, it did not have an obligation to send a cancellation notice.

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[3] "[I]n the absence of a restrictive statutory provision, the insurer and insured have the right to specify in their insurance contract the method by which it can be terminated." Taxter v. Safeco Ins. Co. of Am., 44 Wn. App. 121, 127, 721 P.2d 972 (1986).

But Safeco also asserts the December 2, 2008 notice of expiration complied with the requirement to provide notice of cancellation. We agree with Safeco.

In Safeco Insurance Co. v. Irish, 37 Wn. App. 554, 681 P.2d 1294 (1984), we held that the cancellation provisions of an insurance policy did not apply to the failure to pay a renewal premium.

> Unfortunately, the issue before us was brought about in great measure because of the form chosen by Safeco to notify Irish that he had an extended period of time in which to reinstate coverage under his lapsed policy. Although denominated a "cancellation" notice, it was, in fact, merely a reminder that (1) Irish had not accepted Safeco's offer to renew, (2) his policy had lapsed, and (3) he was being given an opportunity to reinstate.
>
> The term "cancellation" refers to a unilateral act of the insurer terminating coverage during the policy term. . . . Neither RCW 48.18.291, relied upon by Irish, nor his policy provisions governing cancellation apply to a situation where the insured fails to pay a premium as a condition to renewal. . . . Thus, the general rule is that failure of an insured to pay a renewal premium by the due date results in a lapse of coverage as of the last day of the policy period.

Irish, 37 Wn. App. at 557-58.

Here, as in Irish, Safeco did not cancel the policy during the policy period. Safeco sent a notice offering to renew the policy upon payment of the premium.[4] Johnson's policy coverage expired because he did not pay the renewal premium. Safeco notified Johnson on September 28, 2008 that his policy would be renewed only if he paid the premium by November 17, 2008. The unambiguous language in the policy states that the policy would renew for a successive period if payment was made on time: "This policy may be renewed for successive policy periods if the required premium is paid and accepted by us on or before the expiration of the current policy period."

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[4] Accordingly, the policy provision that requires Safeco to give 31 days notice if Safeco elects not to renew the policy does not apply.

On December 2, 2008, Safeco notified Johnson again stating that the premium was past due and the policy had expired, but gave him until January 5, 2009 to pay the premium and "keep your policy in effect." The "HOMEOWNERS EXPIRATION NOTICE (for non-payment of premium)" sent to Johnson on December 2 states:

> [A]s of December 1, 2008, we have not yet received your renewal premium of $630.00 from your mortgage company. This payment was due on November 17, 2008. Your Homeowners policy expired at 12:01 a.m. standard time on November 17, 2008.
>
> Fortunately, we can continue your policy, with no lapse in coverage, if you send your payment to us postmarked no later than January 5, 2009. We urge you to contact your mortgage company to ensure that payment is sent in time to keep your policy in effect.

The December 2, 2008 notice complied with the requirements under the policy to provide notice "at least 20 days before the date cancellation takes effect"[5] and the 10-day notice required by RCW 48.18.290(1)(c).

The policy states, "When you have not paid the premium we may cancel at any time by notifying you at least 20 days before the date cancellation takes effect." RCW 48.18.290(1)(c) requires an insurer cancelling a policy for nonpayment of premium to

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[5] The policy states, in pertinent part:

Cancellation.

. . . .

> (1) When you have not paid the premium we may cancel at any time by notifying you at least 20 days before the date cancellation takes effect.

. . . .

Non-Renewal. We may elect not to renew this policy. We may do so by delivering to you, or mailing to you at your mailing address shown in the Declarations, written notice at least 31 days before the expiration date of this policy. Proof of mailing shall be sufficient proof of notice.

send notice at least 10 days before the effective cancellation date.[6]

Johnson claims he did not receive the December 2 notice. The unrebutted evidence establishes Safeco mailed the December 2 notice to Johnson. Under the policy and RCW 48.18.293(2), proof of mailing is proof of notice. See also Trinity Universal Ins. Co. v. Willrich, 13 Wn.2d 263, 273, 124 P.2d 950 (1942) (holding policy provision providing that mailing of notices was proof of notice is enforceable); Sowa v. Nat'l Indem. Co., 102 Wn.2d 571, 580, 688 P.2d 865 (1984) (insurer had to prove policy endorsements were sent, not that they were received); Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus., 57 Wn. App. 886, 889-90, 790 P.2d 1254 (1990).

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[6] RCW 48.18.290 states, in pertinent part:

(1) Cancellation by the insurer of any policy which by its terms is cancellable at the option of the insurer, or of any binder based on such policy which does not contain a clearly stated expiration date, may be effected as to any interest only upon compliance with the following:

(a) For all insurance policies other than medical malpractice insurance policies or fire insurance policies canceled under RCW 48.53.040:

(i) The insurer must deliver or mail written notice of cancellation to the named insured at least forty-five days before the effective date of the cancellation; and

(ii) The cancellation notice must include the insurer's actual reason for canceling the policy.

. . . .

(c) If an insurer cancels a policy described under (a) or (b) of this subsection for nonpayment of premium, the insurer must deliver or mail the cancellation notice to the named insured at least ten days before the effective date of the cancellation.

(d) If an insurer cancels a fire insurance policy under RCW 48.53.040, the insurer must deliver or mail the cancellation notice to the named insured at least five days before the effective date of the cancellation.

(e) Like notice must also be so delivered or mailed to each mortgagee, pledgee, or other person shown by the policy to have an interest in any loss which may occur thereunder. For purposes of this subsection (1)(e), "delivered" includes electronic transmittal, facsimile, or personal delivery.

(2) The mailing of any such notice shall be effected by depositing it in a sealed envelope, directed to the addressee at his or her last address as known to the insurer or as shown by the insurer's records, with proper prepaid postage affixed, in a letter depository of the United States post office. The insurer shall retain in its records any such item so mailed, together with its envelope, which was returned by the post office upon failure to find, or deliver the mailing to, the addressee.

(3) The affidavit of the individual making or supervising such a mailing, shall constitute prima facie evidence of such facts of the mailing as are therein affirmed.

Next, Johnson claims that because Safeco did not properly notify TBW, the policy was in effect as to both TBW and himself on January 25, 2009. We disagree.

Under the terms of the policy, TBW had a separate interest.[7] The policy declaration identified Johnson as the insured and TBW as the "mortgagee." The policy specifically provides additional protection to the mortgagee that requires notification before cancellation or renewal. The policy states, in pertinent part:

> Mortgage Clause.
> . . . If mortgagee is named in this policy, any loss payable under Coverage A or B shall be paid to the mortgagee and you, as interests appear. . . . If we deny your claim, that denial shall not apply to a valid claim of the mortgagee, if the mortgagee:
> a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;
> b. pays any premium due under this policy on demand if you have neglected to pay the premium;
> . . . .
> . . . If the policy is canceled or not renewed by us, the mortgagee shall be notified at least 20 days before the date cancellation or nonrenewal takes effect.

Consistent with the terms of the policy, on January 11, 2009, Safeco sent TBW a notice of cancellation. The notice states:

> We are cancelling this policy for nonpayment of premium. Your interest in this policy is cancelled. Coverage will end at 12:01 a.m. standard time on February 5, 2009.[8]

The court did not err in granting the summary judgment dismissal of the claims against Safeco.[9]

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[7] In a statement of additional authority, Safeco also cites Wisniewski v. State Farm General Insurance Co., 25 Wn. App. 766, 609 P.2d 456 (1980). In Wisniewski, the insurance company provided notice of cancellation to the homeowners but not to the lien holder. Wisniewski, 25 Wn. App. at 769. The court held that the cancellation was effective as to only the homeowners. Wisniewski, 25 Wn. App. at 769.

[8] (Emphasis added.)

[9] For the first time in his reply brief, Johnson attempts to argue the renewal and cancellation provisions are ambiguous. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549, 553 (1992) (issue raised for the first time in a reply brief is too late to warrant consideration).

CR 50 Judgment as a Matter of Law

Johnson contends the trial court erred in granting the CR 50 motion for judgment as a matter law. Johnson alleged Mount Vernon breached the duty "to pay for fire related repairs, personal property damage, and additional living expenses" in violation of the WAC and the CPA.

Johnson does not challenge dismissal of his contract claims. Nor can he. It is well established that if the insured commits fraud with the intent of deceiving the insurance company, the insured forfeits any claim under the policy. Cox, 110 Wn.2d at 652-53; see also William E. Shipley, Annotation, Overvaluation In Proof of Loss of Property Insured As Fraud Avoiding Fire Insurance Policy, 16 A.L.R.3D 774, § 2 (1967). Accordingly, the Mount Vernon policy expressly states, in pertinent part:

> Q. Concealment Or Fraud
> We provide coverage to no "insureds" under this policy if, whether before or after a loss, an "insured" has:
> 1. Intentionally concealed or misrepresented any material fact or circumstance;
> 2. Engaged in fraudulent conduct; or
> 3. Made false statements;
>
> relating to this claim.

Nonetheless, Johnson asserts the court erred in dismissing his bad faith and CPA claims because his fraud occurred after Mount Vernon committed the alleged bad faith and violated the CPA. Mount Vernon asserts the Washington Supreme Court's decision in Cox is dispositive. We agree with Mount Vernon.

We review a CR 50 motion for judgment as a matter of law de novo. Goodman v. Goodman, 128 Wn.2d 366, 371, 907 P.2d 290 (1995). The decision to grant a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say as a matter of law that there is no

substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

Johnson does not challenge any of the undisputed and extensive findings of fact set forth in the "Order Granting Defendant Mount Vernon's Motion for Judgment as a Matter of Law." The undisputed findings establish he intentionally misrepresented material facts during the course of his claim with Mount Vernon by submitting a fraudulent lease "in order to obtain ALE benefits under the Mt. Vernon policy."

In Cox, the insured purchased a homeowners' policy from Mutual of Enumclaw (MOE) that provided coverage for his home and $137,000 in unscheduled personal property. Cox, 110 Wn.2d at 645. The policy contained a provision stating that the entire policy was void if an insured willfully concealed or misrepresented any material fact or circumstance. Cox, 110 Wn.2d at 646.

A fire destroyed the house and its contents. Cox, 110 Wn.2d at 645. The insured Cox submitted an itemized inventory in the amount of $324,420 for personal property destroyed by the fire. Cox, 110 Wn.2d at 645. MOE "found no trace of certain items claimed lost," including jewelry and bronze statutes valued at $35,000 to $40,000. Cox, 110 Wn.2d at 646.

MOE filed a declaratory judgment action asserting that under the terms of the policy, the fraudulent claim voided coverage. Cox, 110 Wn.2d at 646. Cox filed a counterclaim alleging MOE committed bad faith and unfair and deceptive practices while processing his claim in violation of the WAC and the CPA. Cox, 110 Wn.2d at 646-47.

The jury found in favor of Cox. In the special interrogatories, the jury found that

Cox committed fraud but that MOE was "estopped by its acts and conduct from voiding the insurance policies," and that MOE "act[ed] in bad faith in the handling of defendant's claim under the provisions of the Consumer Protection Act" and the WAC. Cox, 110 Wn.2d at 647-48. The trial court granted MOE's motion for judgment notwithstanding the verdict. Cox, 110 Wn.2d at 648. The trial court ruled that Cox's fraud precluded the use of estoppel. Cox, 110 Wn.2d at 648.

The Washington Supreme Court affirmed. Cox, 110 Wn.2d at 654. The Court held that the insured was not entitled to assert estoppel and that after finding that the insured committed fraud, the jury should not have considered the claims that MOE committed bad faith, violated the WAC, and violated the CPA. Cox, 110 Wn.2d at 652.

The Court held that where the insured intentionally misrepresents material facts during the claims process, the insured is not entitled to pursue bad faith or CPA claims. Cox, 110 Wn.2d at 652-53. In rejecting the insured's argument that the finding of fraud should not preclude his bad faith and CPA claims, the court states that the insured's fraud precludes any actions for bad faith or violation of the CPA. Cox, 110 Wn.2d at 652-53.

> [T]he 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.
>
> . . . .
>
> The CPA exists to protect consumers, not to aid and abet fraud. We hold that Cox is not entitled to recovery under the CPA.

Cox, 110 Wn.2d at 652-53.

Here, because there is no dispute that Johnson committed fraud during the claim process, he is not entitled to pursue the bad faith and CPA claims against Mount Vernon. See also Tornetta v. Allstate Ins. Co., 94 Wn. App. 803, 806-07, 810, 973 P.2d 8 (1999) (where the insured misrepresented the value of the jewelry and falsified a receipt from the jewelry store but alleged the insurance company committed bad faith and violated the CPA during the investigation of his claim for the allegedly stolen items, the court held that a plaintiff who commits fraud may not "pursue a bad faith or CPA claim"); Kim, 153 Wn. App. at 361 (insured's material misrepresentations "negate a finding that Allstate acted in bad faith or in violation of the CPA"); and Wickswat v. Safeco Ins. Co., 78 Wn. App. 958, 971, 904 P.2d 767 (1995) (where the insured intentionally misrepresented material facts during the claims process, under Cox, the insured is not entitled to sue the insurer for bad faith or violation of the CPA).

Strother v. Capitol Bankers Life Insurance Co., 68 Wn. App. 224, 842 P.2d 504 (1992), and Ellis v. William Penn Life Assurance Co. of America, 124 Wn.2d 1, 873 P.2d 1185 (1994), do not support Johnson's argument that despite his fraud, he is entitled to pursue the bad faith and CPA claims.

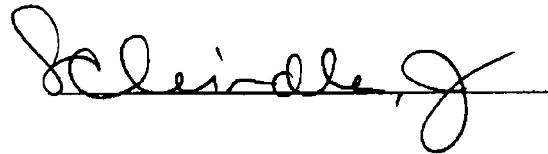
In Ellis, the Supreme Court consolidated and considered two cases, Ellis and Strother. Ellis, 124 Wn.2d at 3. The Court distinguished Cox and held that in the context of a replacement life insurance policy, the insured's fraud does not prevent an innocent beneficiary from asserting equitable estoppel against an insurer who has acted in bad faith. Ellis, 124 Wn.2d at 14. Ellis stands for the proposition that in the context of replacement life insurance, it would be unfair to bar an innocent beneficiary from relying on equitable estoppel where both the insurer and insured engaged in wrongful acts.

See Wickswat, 78 Wn. App. at 975. But the same fairness and policy considerations do not apply in either Cox or here where no third party beneficiary is involved. See Wickswat, 78 Wn. App. at 975.

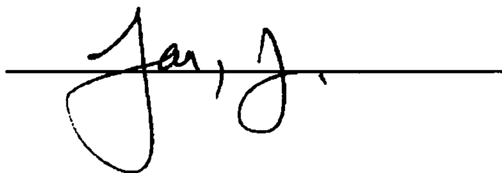
Johnson's reliance on Oregon Mutual Insurance Co. v. Barton, 109 Wn. App. 405, 36 P.3d 1065 (2001), is also misplaced. In Barton, the court addressed whether a settlement between an insurer and the insured was enforceable. The insurance company attempted to void the policy after the settlement, claiming the insured had made material misrepresentations. Barton, 109 Wn. App. at 411. The court concluded the alleged misrepresentations could not have induced the settlement because the misrepresentations occurred after the settlement. Barton, 109 Wn. App. at 416.

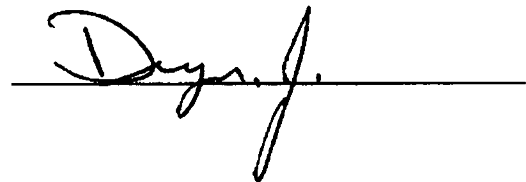
We conclude the trial court did not err in granting Mount Vernon's motion for judgment as a matter of law.

We affirm dismissal of Johnson's lawsuit against Safeco and Mount Vernon.



WE CONCUR:





APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOEL JOHNSON, a single person, Appellant, v. SAFECO INSURANCE COMPANY OF AMERICA, an insurance company; MOUNT VERNON FIRE INSURANCE COMPANY, an insurance company, Respondents, TAYLOR, BEAN & WHITAKER MORTGAGE CORP., a Washington corporation, Defendant.	No. 68029-3-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

Appellant Joel Johnson filed a motion for reconsideration. Respondents Safeco Insurance Company of America and Mount Vernon Fire Insurance Company each filed an answer. The panel having determined that the motion should be denied but the opinion amended; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied. The opinion of this court in the above-entitled case filed September 16, 2013 shall be amended as follows:

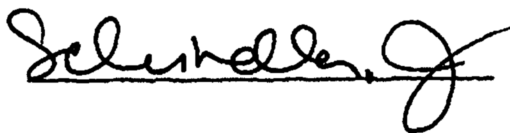
1. On Page 13, at the end of the first full paragraph and the sentence that states, "The December 2, 2008 notice complied with the requirements under

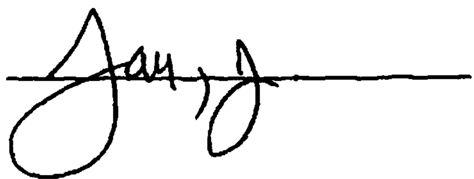
the policy to provide notice "at least 20 days before the date cancellation takes effect"[5] and the 10-day notice required by RCW 48.18.290(1)(c)," add the following footnote 6:

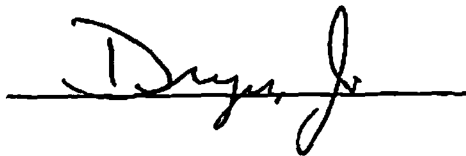
> In his reply brief, Johnson cites Whistman v. West American, 38 Wn. App. 580, 583, 686 P.2d 1086 (1984). In Whistman, the court held that because the policy language was ambiguous, the notice of cancellation was not effective. Whistman, 38 Wn. App. at 584. However, the court noted that by contrast, the policy language in Safeco Insurance Co. v. Irish, 37 Wn. App. 554, 681 P.2d 1294 (1984), was not ambiguous. Whistman, 38 Wn. App. at 584 n.1. Here, unlike in Whistman, the policy language is not ambiguous, and the notice complied with the plain language of the policy and RCW 48.18.290(1)(c).

The remaining footnotes shall be renumbered accordingly, and the remainder of the opinion shall remain the same.

Dated this 30th day of December, 2013.







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APPENDIX C

RCW 48.18.290
Cancellation by insurer.

(1) Cancellation by the insurer of any policy which by its terms is cancellable at the option of the insurer, or of any binder based on such policy which does not contain a clearly stated expiration date, may be effected as to any interest only upon compliance with the following:

(a) For all insurance policies other than medical malpractice insurance policies or fire insurance policies canceled under RCW 48.53.040:

(i) The insurer must deliver or mail written notice of cancellation to the named insured at least forty-five days before the effective date of the cancellation; and

(ii) The cancellation notice must include the insurer's actual reason for canceling the policy.

(b) For medical malpractice insurance policies:

(i) The insurer must deliver or mail written notice of the cancellation to the named insured at least ninety days before the effective date of the cancellation; and

(ii) The cancellation notice must include the insurer's actual reason for canceling the policy and describe the significant risk factors that led to the insurer's underwriting action, as defined under RCW 48.18.547(1)(e).

(c) If an insurer cancels a policy described under (a) or (b) of this subsection for nonpayment of premium, the insurer must deliver or mail the cancellation notice to the named insured at least ten days before the effective date of the cancellation.

(d) If an insurer cancels a fire insurance policy under RCW 48.53.040, the insurer must deliver or mail the cancellation notice to the named insured at least five days before the effective date of the cancellation.

(e) Like notice must also be so delivered or mailed to each mortgagee, pledgee, or other person shown by the policy to have an interest in any loss which may occur thereunder. For purposes of this subsection (1)(e), "delivered" includes electronic transmittal, facsimile, or personal delivery.

(2) The mailing of any such notice shall be effected by depositing it in a sealed envelope, directed to the addressee at his or her last address as known to the insurer or as shown by the insurer's records, with proper prepaid postage affixed, in a letter depository of the United States post office. The insurer shall retain in its records any such item so mailed, together with its envelope, which was returned by the post office upon failure to find, or deliver the mailing to, the addressee.

(3) The affidavit of the individual making or supervising such a mailing, shall constitute prima facie evidence of such facts of the mailing as are therein affirmed.

(4) The portion of any premium paid to the insurer on account of the policy, unearned because of the cancellation and in amount as computed on the pro rata basis, must be actually paid to the insured or other person entitled thereto as shown by the policy or by any endorsement thereon, or be mailed to the insured or such person as soon as possible, and no later than forty-five days after the date of notice of cancellation to the insured for homeowners', dwelling fire, and private passenger auto. Any such payment may be made

by cash, or by check, bank draft, or money order.

(5) This section shall not apply to contracts of life or disability insurance without provision for cancellation prior to the date to which premiums have been paid, or to contracts of insurance procured under the provisions of chapter 48.15 RCW.

[2006 c 8 § 212; 1997 c 85 § 1; 1988 c 249 § 2; 1986 c 287 § 1; 1985 c 264 § 17; 1982 c 110 § 7; 1980 c 102 § 7; 1979 ex.s. c 199 § 5; 1975-'76 2nd ex.s. c 119 § 2; 1947 c 79 § .18.29; Rem. Supp. 1947 § 45.18.29.]

Notes:

Application -- 2006 c 8 §§ 211-213: See note following RCW 48.18.547.

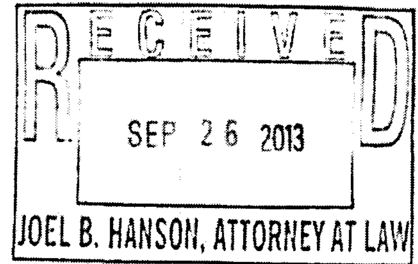
Findings -- Intent -- Part headings and subheadings not law -- Severability -- 2006 c 8: See notes following RCW 5.64.010.

Effective date -- 1988 c 249: See note following RCW 48.18.289.

Application -- 1985 c 264 §§ 17-22: "Sections 17 through 22 of this act apply to all new or renewal policies issued or renewed after May 10, 1985. Sections 17 through 22 of this act shall not apply to or affect the validity of any notice of cancellation mailed or delivered prior to May 10, 1985. Sections 17 through 22 of this act shall not be construed to affect cancellation of a renewal policy, if notice of cancellation is mailed or delivered within forty-five days after May 10, 1985. Sections 17 through 22 of this act shall not be construed to require notice, other than that already required, of intention not to renew any policy which expires less than forty-five days after May 10, 1985." [1985 c 264 § 24.]

APPENDIX D

No. 68029-3



COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

JOEL JOHNSON

Appellant,

v.

SAFECO INSURANCE COMPANY OF AMERICA AND
MOUNT VERNON FIRE INSURANCE COMPANY

Respondents.

SAFECO'S MOTION TO PUBLISH
RAP 12.3(e)

Counsel on Appeal for Respondent,
Safeco Insurance Company of America:
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Telephone 206.623.4100
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1. ***Identity of Moving Party***

The moving party is one of the two insurer-defendants below and respondents on appeal, Safeco Insurance Company of America ("Safeco"). Safeco is an insurer headquartered in Boston, Massachusetts, engaged in the business of insurance in the State of Washington.

2. ***Statement of Relief Sought***

Pursuant to RAP 12.3(e), Safeco asks the Court to publish its opinion in this case, issued on September 16, 2013, because the opinion clarifies the law and addresses issues of public importance and general application to insurers and their policyholders in the State of Washington.

3. ***Facts Relevant to Motion***

The Court issued its unpublished opinion in this case on September 16, 2013.

4. ***Statement of Grounds for Relief Sought***

Our Legislature has declared, in RCW 48.01.030, that "[t]he business of insurance is one affected by the public interest." The Court decision in this litigated insurance dispute, by its very nature, addresses an issue of public interest and general importance within the meaning of RAP 12.3(e)(5). As explained below, the decision also clarifies the law, per RAP 12.3(e)(4).

The Court's decision addresses two key issues in insurance law that merit publication, to permit Washington courts and attorneys to rely on the decision as precedent in future insurance litigation.

First, the Court's opinion carefully reviews the relevant provisions of the Safeco homeowners insurance policy, as issued to the plaintiff-appellant, Joel Johnson, as they relate to the renewal, non-renewal and cancellation of coverage. The policy Safeco issued to Mr. Johnson contains provisions that are common to homeowners coverages issued to thousands of Safeco policyholders in Washington; and similar provisions no doubt are included in homeowners policies issued by other insurers doing business in Washington.

When the time came for renewal of Mr. Johnson's homeowners insurance policy, and for payment of the premium required to effectuate the renewal, Safeco followed its usual and customary procedures for providing written notice to its policyholder. Mr. Johnson did not pay the renewal premium or contact his mortgage company to ensure that the premium was being paid on his behalf. The policy was not renewed, even though Mr. Johnson was given multiple opportunities to pay the premium to renew, and after non-renewal, to reinstate his policy. The policy was no longer in force as to Mr. Johnson's interest when a loss occurred. As often happens in such situations, Mr. Johnson claimed he had not received Safeco's notices; and

even if he had received the notices, they did not comply with the requirements of the policy and the insurance statutes.

In a step by step manner, the Court's decision reviews Safeco's procedures for notifying its homeowners insureds of the need to renew and to pay a premium to effectuate renewal, both before and after the renewal date. The decision ties these procedures to the relevant policy language and the requirements of the applicable Washington insurance statutes. In so doing, the decision provides clear guidance. If published, the decision will serve as precedent that can guide Washington courts and attorneys in future cases; and hopefully prevent unwarranted litigation based on unfounded claims that the Safeco notification procedures do not comply with the policy and/or the statutes.

Second, the Court's opinion clarifies the rule in *Mutual of Enumclaw v. Cox,*[1] that an insured's breach of the insurance policy's "void for fraud" provisions will forfeit the insured's rights under the contract of insurance *and* his right to pursue extracontractual relief at common law and under Washington insurance regulations and statutes. Here, Mr. Johnson made the somewhat novel argument that the *Cox* rule does not apply if the insured makes a material misrepresentation concerning his claim for insurance *after* the insurer allegedly committed "bad faith" in handling his claim. The

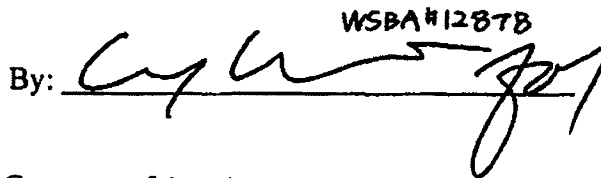
[1] 110 Wn.2d 643, 757 P.2d 499 (1988).

Court's decision squarely addresses and rejects that argument. As far as Safeco is aware, this is the first Washington decision on this point. The Court's ruling will provide useful guidance to Washington courts and practitioners on an issue of public interest and general importance, by fleshing out and clarifying this particular aspect of the *Cox* rule.

5. ***Conclusion***

The Court's opinion in this case should be published in the Washington Appellate Reports, thereby permitting Washington courts and litigants to cite the opinion as precedent under the applicable court rules.

Respectfully submitted this 24 day of September, 2013.

By: 

Counsel for Safeco Insurance Company of America:

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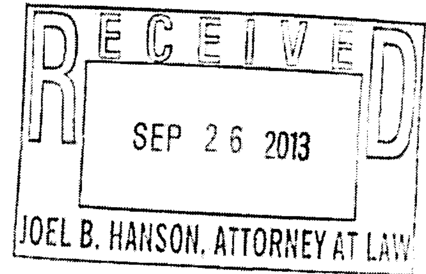
APPENDIX E



No. 68029-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JOEL JOHNSON, Appellant, v. SAFECO INSURANCE COMPANY OF AMERICA and MOUNT VERNON FIRE INSURANCE COMPANY, Respondents.	RESPONDENT MOUNT VERNON FIRE INSURANCE COMPANY'S JOINDER IN RESPONDENT SAFECO INSURANCE COMPANY OF AMERICA'S MOTION TO PUBLISH

1. Identity of Moving Party

Respondent, Mount Vernon Insurance Company ("Mt. Vernon"), joins in Respondent Safeco Insurance Company of America's ("Safeco"), motion to publish.

2. Statement of Relief Sought

Mt. Vernon joins in Safeco's motion to publish, pursuant to RAP 12.3(e), as it respects the second appellate issue therein, *i.e.*, the Court's clarification of *Mutual of Enumclaw v. Cox.*[1] Mt. Vernon respectfully requests that the Court publish its opinion as to that issue in this case given its precedential value regarding the timing of an insured's fraudulent conduct vis-à-vis an insurer's alleged bad faith conduct.

[1] 110 Wn.2d 643, 757 P.2d 499 (1988).

3. Facts Relevant to Motion

Joel Johnson ("Johnson") had a homeowners 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 barred any further recovery under the policy or for extra-contractual damages. Johnson appealed, arguing that extra-contractual claims should not be barred in situations where an insurer allegedly commits bad faith prior to an insured's admitted fraud. This Court properly affirmed the trial court's decision in a September 16, 2013 unpublished opinion, 2013 WL 5288167. In its opinion, the Court thoroughly addressed, in turn, each of Johnson's contentions, finding them unpersuasive.

Significantly, this Court's opinion clarifies an important aspect of the rule of law enunciated in *Cox* as respects the timing of an insured's fraud versus the alleged bad faith of an insurer. Nevertheless, because the opinion is not published, it regrettably carries no precedential weight and cannot serve as binding authority. In order to provide future guidance on the breadth of the *Cox* decision, Mt. Vernon hereby respectfully requests that this Court publish its opinion.

4. **Grounds for Relief and Argument**

Mt. Vernon hereby joins in Safeco's motion to publish and incorporates, by this reference, the grounds for relief and argument contained in the motion to publish.

Mt. Vernon joins in Safeco's motion to publish, which was brought pursuant to RAP 12.3(e) and *State v. Fitzpatrick*.[2] These authorities provide that opinions of the Court of Appeals should be published: (1) where the decision determines an unsettled or new question of law or constitutional principle, (2) where the decision modifies, clarifies or reverses an established principle of law, (3) where the decision is of general public interest or importance; or (4) where the case is in conflict with a prior opinion of Court of Appeals.

Fitzpatrick also explains that Court of Appeals' decisions should not be published where the decision, whether an affirmance or reversal, is determined by following a legal principle or principles well-established by previous decisions.[3] Thus, because unpublished opinions have no precedential value and should not be cited or relied upon in any manner,[4] they should only properly be rendered in cases where the issues of law are well-settled, thereby obviating the Court's need to provide clarification. Cases should be published, on the other hand, to provide future guidance on issues of first impression or on issues that may have been previously

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[2] 5 Wn. App. 661, 669, 491 P.2d 262 (1971), *rev. den.*, 80 Wn.2d 1003 (1972).

[3] *Id.*

[4] *Skamania County v. Woodal*, 104 Wn. App. 525, 536 n.11, 16 P.3d 701, *rev. den.*, 144 Wn.2d 1021, 34 P.3d 1232 (2001).

decided, but where the prior decisions rendered are in need of clarification. Guidance of this nature is arguably instrumental in relieving congestion in the courts, and would deter the repeated litigation of issues determined in established precedent.

Here, *Mutual of Enumclaw v. Cox* stands for the proposition that an insured who intentionally misrepresents material facts during the course of the claim is precluded from recovering under the insurance policy or for any extra-contractual claims such as bad faith or violations of the Consumer Protection Act. While that case clearly states that misrepresentations made during the claim process bar coverage, it does not address the situation where there is alleged bad faith conduct which precedes the misrepresentations. Publishing this decision will clarify *Cox* to include such situations as this where an insured alleges that he was forced to act fraudulently by an insured's alleged bad faith conduct.

Further, this issue is of general public interest or importance. As Safeco notes, RCW 48.01.030 states that "[t]he business of insurance is one affected by the public interest." Clarifying the *Cox* decision in the manner contemplated above will make it crystal clear that fraudulent conduct is never an acceptable response to the perceived mishandling of an insurance claim. Publishing this case will act as a deterrent to insureds contemplating fraud, even where they feel they have been treated unreasonably by their insurers. Given the strict rules of law that apply in situations where an insurer acts in bad faith, it makes sense to have a

counterbalance for situations where insureds attempt to defraud their insurer.

5. Conclusion

For the reasons stated above, Mt. Vernon joins in Safeco's motion and asks that the Court grant the motion to publish based on its precedential value regarding the timing of an insured's fraud with an insurer's alleged bad faith conduct, which constitutes an issue of public importance.

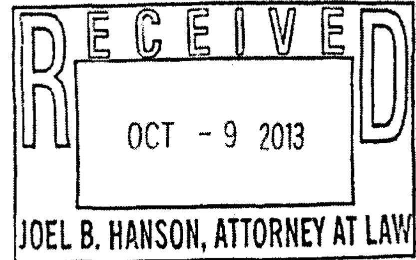
DATED and respectfully submitted this 26th day of September, 2013.

BETTS PATTERSON & MINES, P.S.

By:

Jeffrey S. Tindal, WSBA #29286
Joseph D. Hampton, WSBA #15297
Attorneys for Mount Vernon Fire Insurance Company

APPENDIX F



NO. 68029-3-1

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

JOEL JOHNSON

Plaintiff/Respondent,

v.

SAFECO,

Defendant/Appellant.

MOTION TO PUBLISH

COLE | WATHEN | LEID | HALL, P.C.
Rick J Wathen, WSBA No. 25539
Counsel for Third Parties
1000 Second Avenue, Suite 1300
Seattle, WA 98104-1972
Telephone: (206) 622-0494

I. IDENTITY OF MOVING PARTY

The moving parties are Farmers Insurance Company of Washington, an insurer, engaged in the business of insurance in the State of Washington and Allstate Insurance Company and its affiliated companies, which are also engaged in the business of insurance in the State of Washington.

II. STATEMENT OF RELIEF REQUESTED

Pursuant to RAP 12.3(e), the insurers ask this Court to publish the opinion in this case issued on September 16, 2013, because the opinion provides guidance concerning issues related to insurance fraud and addresses the issues of public policy of insurance claims in the State of Washington.

III. FACTS RELEVANT TO THE MOTION

The facts are fully set forth in this Court's opinion, dated September 16, 2013.

IV. STATEMENT FOR GROUNDS FOR RELIEF

The legislature has stated that insurance is of a high public interest. RCW 48.01.030. Issues of insurance fraud have also been addressed by the legislature in RCW 48.30(a) et. seq., and declared it unlawful to engage in various conduct which may be deemed as insurance fraud. The legislature has deemed insurance as an issue of public interest in general

importance within the meaning of RAP 12.3(c)(5). Additionally, the decision provides guidance pursuant to RAP 12.3(e)(4) regarding issues concerning insurance fraud, which will allow attorneys and courts to rely upon as controlling authority in future insurance fraud litigation.

The Court's decision addresses the decision *Mutual of Enumclaw v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988) and the interplay between fraudulent insurance claims and subsequent remedies available under the Consumer Protection Act. The Court's decision reaffirms that an insured is not entitled to pursue bad faith and CPA claims against insurance carriers when they have committed insurance fraud. Significantly, this decision also clarifies that insureds may not pursue IFCA claims when the insured has committed fraud. This rule of law applies when the insured made material misrepresentation in the claims process. This decision clarifies the issue that the policy of insurance is void if an insured commits fraud *regardless* of whether or not the insurer commits any technical violation under the CPA and Washington Administrative Code.

And finally, this Court's Order distinguishes the decision of *Oregon Mutual Insurance v. Barton*, 109 Wn.App. 405, 36 P.3d 1065 (2001). The Court in *Barton* addressed the issues related to fraud in the inducement of a settlement agreement, as opposed to fraud in the claims process and litigation, which occurs pre-settlement. This Court makes the

distinction between the timing and application of when the fraud occurs. This clarification will provide guidance to practitioners. Additionally, there may be the added benefit of further encouraging settlement and upholding and enforcing settlements.

RESPECTFULLY SUBMITTED this 25 day of October, 2013.

COLE | WATHEN | LEID | HALL, P.C.

By:______________________

Rick J Wathen, WSBA No. 25539
Counsel for Third Parties

APPENDIX G

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOEL JOHNSON, a single person, Appellant, v. SAFECO INSURANCE COMPANY OF AMERICA, an insurance company; MOUNT VERNON FIRE INSURANCE COMPANY, an insurance company, Respondents, TAYLOR, BEAN & WHITAKER MORTGAGE CORP., a Washington corporation, Defendant.	)	No. 68029-3-I DIVISION ONE ORDER GRANTING MOTION TO PUBLISH

Respondent Safeco Insurance Company of America filed a motion to publish the opinion filed on September 16, 2013. Third parties Farmers Insurance Company of America and Allstate Insurance Company also filed a motion to publish the opinion. A majority of the panel has determined that the motion to publish should be granted and the opinion filed on September 16, 2013 amended by the order filed on December 20, 2013 shall be published;

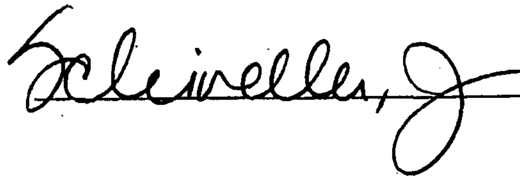
Now, therefore, it is hereby

No. 68029-3-I/2

ORDERED that the motion to publish is granted and the opinion filed on September 16, 2013 amended by the order filed on December 20, 2013 shall be published.

DATED this 15 day of January, 2014.

FOR THE COURT:



Judge

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