

NO. 37256-8-II

Pierce County Cause No. 07-2-04911-3

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

KI SIN KIM,
individually,

Plaintiff/Respondent,

v.

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Defendant/Appellant.

FILED
COURT OF APPEALS
DIVISION II
03 OCT -8 PM 1:14
STATE OF WASHINGTON
BY  DEPUTY

REPLY BRIEF OF APPELLANT ALLSTATE INSURANCE
COMPANY

COLE, LETHER, WATHEN & LEID, P.C.
Rory W. Leid III, WSBA #25075
Morgan Emmerton Smith, WSBA #37954
Attorneys for Petitioner
Allstate Insurance Company

1000 Second Avenue, Suite 1300
Seattle, WA 98104-1972
Telephone: (206) 622-0494

TABLE OF CONTENTS

1. Request for Dismissal of All Claims.....1

2. Kim Does Not Dispute She Misrepresented Facts
to Allstate.....1

3. Kim’s Misrepresentations Were Material.....2

4. It Cannot Be Disputed that Kim’s Misrepresentations
Were Intentional.....4

5. Kim Mis-Quotes *Van Noy v. State Farm*.....6

6. Allstate Properly Investigated Kim’s Claims.....8

7. Allstate Has a Duty to Investigate Potentially
Fraudulent Claims.....9

8. Allstate Did Nit Improperly Co-Mingle the PIP
and UIM Files.....10

a. *Harris v. Drake* Does Not Apply.....11

b. *Ellwein v. Hartford* Does Not Apply.....11

9. Allstate’s Request for an IME Was Made Under
Both the PIP and UIM Coverages.....13

10. Kim Waiver Any Objections to the Investigation
of Her PIP and UIM Claims.....15

11. Kim Has Not Satisfied All Elements of A CPA Claim.....17

12. Kim Not Only Mis-Cites the Law, as Identified
Above, But Also Mis-Cites to the Factual Records.....19

13. This Court May Consider the Videotape Evidence
Submitted with the Declaration of Maucotel.....21

14. Conclusion.....22

TABLE OF CASES AND AUTHORITIES

Washington Cases

<i>Allstate v. Huston</i> , 123 Wn. App. 530, 94 P.3d 358 (2004)	2
<i>Blake v. Federal Way Cycle</i> , 40 Wn. App. 302, 309, 698 P.2d 578 (1985)	17, 18
<i>Carrillo v. City of Ocean Shores</i> , 122 Wn. App. 592, 612, 94 P.3d 961 (2004).	16
<i>Dombrosky v. Farmers Ins. Co.</i> , 84 Wn. App. 245, 260, 928 P.2d 1127	18
<i>Ellwein v. Hartford</i> , 142 Wn.2d 766, 15 P.3d 640 (2000).	10, 11, 12, 13
<i>Hangman Ridge Training Stables v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986)	17, 18, 23
<i>Harris v. Drake</i> , 116 Wn. App. 261, 65 P.3d 350 (2003)	10, 11, 15
<i>Jones v. Best</i> , 134 Wn.2d 232, 241, 950 P.2d 1 (1998).	16
<i>Keyes v. Bollinger</i> , 31 Wn. App. 286, 640 P.2d 1077 (1982)	18
<i>McLanahan v. Farmers Ins. Co. of Washington</i> , 66 Wn. App. 26, 831 P.2d 160 (1992).	19
<i>Music v. United Ins. Co.</i> , 59 Wn.2d 765, 769, 370 P.2d 603 (1962).	4
<i>Mutual of Enumclaw v. Cox</i> , 110 Wn.2d 643, 757 P.2d 499 (1988)	5, 6, 12

<i>Onyon v. Truck Ins. Exch.</i> , 859 F. Supp. 1338 (E.D. Wash., 1994)	12
<i>Pilgrim v. State Farm Fire & Cas. Co.</i> , 89 Wn. App. 712, 950 P.2d 479 (1997).....	10
<i>Quinn v. Mutual Life Ins. Co.</i> , 91 Wn. 543, 158 P. 82 (1916)	4
<i>Sign-O-Lite Signs v. DeLaurenti Florists</i> , 64 Wn. App. 553, 825 P.2d 714 (1992)	17, 18
<i>Smith v. SAFECO Ins. Co.</i> , 150 Wn.2d 478, 78 P.2d 1274 (2003)	19
<i>Spokane County v. Specialty Auto</i> , 153 Wn.2d 238, 248, 103 P.3d 792 (2004)	16
<i>St. Paul Mercury Ins. Co. v. Salovich</i> , 41 Wn.App. 652, 705 P.2d (1985)	12
<i>Starzewski v. Unigard Ins. Co.</i> , 61 Wn. App. 267, 810 P.2d 58 (1991)	19
<i>Transcontinental Ins. Co. v. Washington Pub. Util. Dist.</i> , 111 Wn.2d 452, 760 P.2d 337 (1988)	18, 19
<i>Van de Grift v. Skagit County</i> , 59 Wn. App. 545, 800 P.2d 375 (1990)	17, 18
<i>Van Noy v. State Farm</i> , 142 Wn.2d 784, 16 P.3d 574 (2000).....	6, 7
<i>Wagner v. Wagner</i> , 95 Wn.2d, 94, 102, 621 P.2d 1279 (1980).....	16
<i>Wickswat v. SAFECO Ins. Co.</i> , 78 Wn.App. 958, 904 P.2d 767 (1995)	12
<i>Wilburn v. Pioneer Mut. Life Ins. Co.</i> , 8 Wn. App. 616, 508 P.2d 632 (1973).....	4

Other Cases

Scott v. Harris, 127 S. Ct. 1769 (2007)..... 21, 22

Other Authorities

RCW 48.22.005(7).....8

RCW 48.22.095..... 8

RCW 48.22.100..... 8

RCW 48.30A..... 7

RCW 48.30A.005.....9

RCW 48.30A.050..... 10

WAC 284-30-395(1)..... 8

1. Request for Dismissal of All Claims

Allstate requests that this Court find that Kim intentionally misrepresented material facts to Allstate in the presentation of her claim. Allstate requests that this Court find that Allstate did not violate the CPA. Dismissal of the CPA claim is required when an insured misrepresents a material fact to an insurer. In any event, the reasonableness of Allstate's investigation and denial of Kim's claim prohibits a finding of a CPA violation. Finally, Kim cannot establish all the required elements of a CPA claim, and therefore, this claim must fail.

2. Kim Does Not Dispute She Misrepresented Facts To Allstate

Kim does not dispute the fact that she misrepresented portions of her claim and injuries to Allstate. As a result, the following facts are undisputed:

- Kim submitted a Wage and Salary Verification form signed by her employer on October 7, 2005, indicating she had not returned to work since July 1, 2005.
- Kim was observed working at Yoko Teriyaki on September 20 and 22, 2005, contrary to her wage and salary form.
- Kim was examined by Dr. Nicholes at an independent medical examination on October 10, 2005, where she claimed she was unable to work.
- Kim also claimed during the independent medical examination that she could not drive or stand for longer than one hour.
- On October 11, 2005, Kim was observed driving and walking

without any physical limitations.

- Kim informed Allstate on October 26, 2005, that she had not returned to work at any time following the accident due to her injuries.
- Kim informed Allstate on November 21, 2005, that she had not returned to work at any time as of that date.
- During the arbitration on June 28, 2007, Kim testified that she did work at Yoko Teriyaki during the time she previously claimed she was unable to do so; however, she claimed to have received no compensation for this work.
- Kim finally admitted in her deposition taken on September 19, 2007, that she did work at Yoko Teriyaki during September and October 2005, and was paid for this work.

Kim admits in her responsive brief that she submitted a wage loss claim and that she provided false testimony regarding that claim. Kim speciously submits that these misrepresentations were neither material nor intentional.

3. Kim's Misrepresentations Were Material

Kim cites incorrectly to *Allstate v. Huston*, 123 Wn. App. 530, 94 P.3d 358 (2004) for the proposition that a "simple" error does not constitute a material misrepresentation. Kim fails to cite to a page number or specific quotation from this case to support this conclusion. Nowhere in *Allstate v. Huston* does the court say that a simple error does not constitute a material misrepresentation. Rather, *Allstate v. Huston*, supports the premise that a

“misrepresentation is material, if, when made, it could have affected the insurer’s investigation.” *Huston, supra*, at page 539.

Regardless, Kim’s misrepresentations were not “simple errors,” but rather intentional and material misrepresentations regarding her injuries and her wage loss claim. On October 7, 2005, Kim claimed she could not and had not worked since the accident. She made this claim despite the fact she worked on at least September 20 and 22, 2005. CP 104 and CP 46-54.

Kim also claims, without legal authority, that “a material misrepresentation is one that is designed, purposefully, by the insured to mislead the insurance company.” This is a completely erroneous statement of the law. In particular, *Allstate v. Huston* states:

In Washington, a misrepresentation is material “when it ‘concerns a subject relevant and germane to the insurer’s investigation as it was then proceeding’ at the time the inquiry was made”. In other words, a misrepresentation is material if, when made, it could have affected the insurer’s investigation.

Allstate v. Huston, supra at 539, internal citations omitted.

Kim’s attempts to fraudulently receive insurance payments for lost wages are germane to Allstate’s investigation into her claim. It is per se material when an insured makes a wage loss claim and provides false information about her ability to work. Additionally, it is per se material to a personal injury claim for the insured to provide false evidence of the nature

and extent of her injuries. As a result, this Court should find that the misrepresentations were material as a matter of law.

4. It Cannot Be Disputed that Kim's Misrepresentations Were Intentional

Kim attempts to argue that because she was not intending to deceive Allstate, she was not in violation of her insurance policy and coverage is not void. However, that is not the standard or rule of law. Kim cites to a 1916 case, *Quinn v. Mutual Life Ins. Co.*, 91 Wn. 543, 158 P. 82 (1916) to support this theory. The requirement that there be an "intent to deceive", as Kim claims is found in *Quinn*, was based on the reading of an insurance code from 1911. *Quinn*, 91 Wn. at 546-547. The court in *Quinn*, went on to explain:

When one has made a false representation, knowing it to be false, the law infers that he did so with the intention to deceive.

Quinn, *supra* at page 547 (emphasis added).

The law and policy requires that a misrepresentation be intentional not that it be made with the intent to deceive. "Intentional" is defined as being made knowingly. *Music v. United Ins. Co.*, 59 Wn.2d 765, 769, 370 P.2d 603 (1962); *Wilburn v. Pioneer Mut. Life Ins. Co.*, 8 Wn. App. 616, 508 P.2d 632 (1973); *Quinn v. Mutual Life Ins. Co.*, 91 Wn. 543, 158 P. 82 (1916).

In this case, it cannot be disputed that Kim intentionally and knowingly misrepresented material facts to Allstate. She submitted her wage

and verification form claiming to not have worked on at least September 20 and 22, 2005 *knowing* that she did in fact work on those two days. CP 104 and CP 46-54. Further, she gave her recorded statement on October 26, 2005 and her examination under oath was taken on November 21, 2005. At both of these times, she knew she had returned to work but knowingly concealed that fact.

Further, Kim claims that she has an explanation for her misrepresentations that would indicate her lack of intent make a material misrepresentation. However, no explanation has ever been provided to Allstate and Kim does not present one to this Court. Allstate did ask Kim why she did not tell Allstate the truth. Kim responded as follows:

Q: And on page 10 of the examination under oath at line 15 here's the question: Question, "have you returned to work in any capacity since the day of the accident?" Answer, "Not yet." Do you see that? Is that a true answer?

Mr. Wilson: Objection, form.

A: I don't know.

Q: Is there any reason why when you were asked that question you didn't answer that you had worked for money in September and October?

Mr. Wilson: Objection, form.

A: I don't know.

CP 186.

Insurance companies have no duty to tell an insured that she has lied or that she is attempting to submit a false claim. *Mutual of Enumclaw v. Cox*,

110 Wn.2d 643, 757 P.2d 499 (1988). Rather, insurance companies have a duty to ferret out fraud. Kim's misrepresentations were made intentionally and knowingly. As a result, this Court should find, as a matter of law, that Kim made intentional and material misrepresentations to Allstate in presenting her claim.

5. Kim Mis-Quotes *Van Noy v. State Farm*

Kim claims that the appellate court in *Van Noy* identified certain duties that Allstate was required to follow as a quasi-fiduciary. Specifically, on page 9 of Kim's brief, she identifies three duties and cites to page 493 of the appellate opinion of *Van Noy* as the source of these duties.

Kim not only incorrectly cites the page number where the court in *Van Noy* identifies the three duties, but she also cites incorrectly the context in which the court addressed these three duties. The appellate court in *Van Noy* never identified the three duties as requirements of insurers in their quasi-fiduciary roles. Rather, the context was an identification of what constituted the argument of the insured:

The representatives [insureds] argue that State Farm owed and violated three overlapping fiduciary duties to its insureds: (1) the duty to disclose all facts that would aid its insureds in protecting their interests; (2) the duty of equal consideration; and (3) the duty not to mislead its insureds.

Van Noy, 98 Wn. App. at 492.

The appellate court in *Van Noy* defined the quasi-fiduciary duty as “[requiring] an insurer to deal fairly with an insured, giving equal consideration in all matters to the insured’s interests as well as its own.” *Van Noy*, 98 Wn. App. at 492. There are no additional “duties” identified by the court as part of the definition of a quasi-fiduciary responsibilities. This sole definition of what the quasi-fiduciary duty consists of was confirmed by the Supreme Court. *Van Noy v. State Farm*, 142 Wn.2d 784, 16 P.3d 574 (2000).

As a result of the definition of the quasi-fiduciary relationship identified above, Kim’s arguments regarding Allstate’s “breach” of the three duties is without merit. The only factors to consider are whether Allstate (1) dealt fairly with Kim, and (2) gave equal consideration to her interests as well as its own.

Given the fact that Kim admittedly misrepresented to Allstate material information regarding her claim, it cannot be disputed that Allstate did not violate any quasi-fiduciary duty. It cannot be argued that Allstate would be dealing fairly and considering both Kim’s and it’s own interests by paying a fraudulent claim. More importantly, Allstate is prohibited by law from paying fraudulent insurance claims. RCW 48.30A. It is, therefore, specious for Kim to now argue that Allstate violated its quasi-fiduciary duty to her by not paying her claim after she misrepresented material facts to Allstate.

6. Allstate Properly Investigated Kim's Claims

Kim claims, without authority, that Allstate did not investigate any of the factors identified in WAC 284-30-395(1)¹. However, Kim ignores the fact that Allstate explicitly indicated to Kim that they were investigating both her PIP and UIM claims and would be responsible for paying only those deemed "reasonable, necessary and related." CP 194. WAC 284-30-395(1) requires an insurer to provide written notice of its denial of benefits and the denial must be based one of the factors identified. As a result, it is unclear how Kim can now claim that Allstate never investigated these factors when it clearly identified its investigation and explained the basis of the denial in a letter dated October 4, 2005. CP 194.

Additionally, the IME report prepared by Dr. Nicholes indicates that Kim's treatment was not reasonable, necessary or credible. CP 114-115. In

1

WAC 284-30-395(1) Within a reasonable time after receipt of actual notice of an insured's intent to file a personal injury protection medical and hospital benefits claim, and in every case prior to denying, limiting, or terminating an insured's medical and hospital benefits, an insurer shall provide an insured a written explanation of the coverage provided by the policy, including a notice that the insurer may deny, limit, or terminate benefits if the insurer determines that the medical and hospital services:

- a. Are not reasonable;
- b. Are not necessary;
- c. Are not related to the accident; or
- d. Are not incurred within three years of the automobile accident.

These are the only grounds for denial, limitation, or termination of medical and hospital services permitted pursuant to RCW 48.22.005(7), 48.22.095, or 48.22.100.

reaching his conclusion, Dr. Nicholes noted altered medical forms and claimed injuries inconsistent with objective findings. CP 114. Further, Kim intentionally misrepresented material facts regarding her claim. This precludes any coverage for any reason.

7. Allstate Has A Duty To Investigate Potentially Fraudulent Claims

Insurers have a responsibility and affirmative duty to investigate potentially fraudulent claims. Specifically, RCW 48.30A.005 states that both insurers and insureds have a duty to abstain from fraudulent activities:

Findings–Intent

The legislature finds that the business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.

RCW 48.30A.005.

The Washington state legislature requires insurance companies to ferret out and identify fraudulent claims:

Insurance antifraud plan–Specific procedures

An insurer’s antifraud plan must establish specific procedures to:

- (1) Prevent insurance fraud, including internal fraud involving employees or company representatives, fraud resulting from misrepresentation on applications for insurance coverage and claims fraud;
 - (2) Review claims in order to detect evidence of possible insurance fraud and to investigate claims where fraud is suspected;
- ...

(5) Train company employees and agents in the detection and prevention of fraud.

RCW 48.30A.050.

Washington courts have confirmed that insurers have a heightened duty to investigate and identify fraudulent insurance claims. See *Pilgrim v. State Farm*, 89 Wn. App. 712, 950 P.2d 479 (1997).

Allstate was presented with a situation in which fraud was suspected. CP 197. Kim submitted a wage loss claim for a lengthy period of time, despite having limited objective injuries as indicated in her medical records. CP 197. Because of this discrepancy, Allstate was required by state law to further investigate this claim. Through the course of the investigation, it was revealed that Kim had, in fact, misrepresented her claim to Allstate. As a result, the policy provided no coverage for any of Kim's claims. CP 70.

8. Allstate Did Not Improperly Co-Mingle the PIP and UIM Files

Kim cites to *Ellwein v. Hartford*, 142 Wn.2d 766, 15 P.3d 640 (2000), and *Harris v. Drake*, 116 Wn. App. 261, 65 P.3d 350 (2003), to support the claim that Allstate impermissibly utilized an "expert" opinion in the PIP and UIM claims. While Kim does not identify the "expert" opinion, it is presumed that Kim references the independent medical examination (IME) report by Dr. Nicholes. However, Kim ignores the fact that both her PIP and UIM policy coverages allow for an IME to be requested by Allstate. More

importantly, Kim ignores the overarching point: she misrepresented her claim to Allstate thus voiding all coverage under the policy.

a. *Harris v. Drake Does Not Apply*

Kim admits that *Harris v. Drake* addressed a situation where information from a PIP file could not be produced to a third party. See Plaintiff's brief at page 13. However, Kim ignores the fact that the court made this ruling due to the fact that releasing the PIP information to the third party was adverse to both the insured and insurer. *Harris, supra* at 489.

Further, *Harris* dealt with a situation involving a claim for PIP benefits and a liability claim against a third party. In this case, the situation does not involve a third party claim. Rather, it is an insured seeking coverage from an insurer. As a result, the principles from *Harris* are distinguishable from this matter.

Finally, the court in *Harris*, concluded that an IME report is the privileged work product of the insurer. *Harris*, 152 Wn.2d at 489. As a result, Allstate is within its rights to use the IME report for its own purposes and in the investigation of all aspects of a first party claim.

b. *Ellwein v. Hartford Does Not Apply*

Similarly, *Ellwein v. Hartford* is not analogous to the present situation. In *Ellwein*, the court addressed the propriety in utilizing an expert's

opinion in the third party liability and UIM situations. In juxtaposition, this case only involves Kim's first party PIP and UIM coverages.

Kim has presented no case law to support the claim that an insurer cannot simultaneously investigate its own insured's PIP and UIM claims. Both Kim's PIP and UIM coverages restrict Kim from making misrepresentations regarding her claims. The contract itself does not distinguish between coverages in relation to the duties of an insured to not misrepresent material facts regarding their claims. Washington courts have repeatedly and emphatically stated that when an insured intentionally misrepresents a material fact to their insurer, all coverage is void under the policy. *Onyon v. Truck Ins. Ex*, 859 F. Supp. 1338 (W.D. Wash. 1994); *Mutual of Enumclaw v. Cox*, 110 Wn.2d 643, 757 P.3d 499 (1988); *Wickswat v. Safeco*, 78 Wn. App. 958, 904 P.2d 767 (1995), *pet. for rev. denied*, 128 Wn.2d 1017 (1996); *St. Paul Mercury v. Salovich*, 41 Wn. App. 652, 705 P.2d 812, *pet. for rev. denied*, 104 Wn.2d 1019 (1985). An insured need only make one misrepresentation to void all coverage under the entire policy. *Onyon v. Truck Ins. Ex*, 859 F. Supp. at 1341 (W.D. Wash. 1994).

As a result, the policy supports the fact that because Kim did misrepresent a material fact to Allstate regarding her claim for coverage, coverage is precluded for all coverages. Whether Allstate jointly investigated

the PIP and UIM claims is immaterial. Kim cannot now claim to be “prejudiced” by her own misrepresentations.

9. Allstate’s Request For An IME Was Made Under Both the PIP and UIM Coverages

Kim erroneously asserts that because one IME report was produced and used in both the PIP and UIM coverages, Allstate acted in bad faith. This argument must fail based on the fact that the policy allows Allstate to request an IME under both the PIP and UIM coverages. Requiring Allstate to obtain two IMEs would be unnecessary and impractical.

On October 4, 2005, Allstate informed Kim that the investigation into her PIP and UIM claims were continuing. CP 194. In this same correspondence, Allstate exercised its contractual right and requested that Kim submit to an IME under both coverages. CP 194. Specifically, the policy’s PIP and UIM coverages provide for an IME of the insured as follows:

Part V-Personal Injury Protection Coverage-VA

...

Proof of Claim: Medical Reports

...

The insured person may be required to take physical examinations by physicians we choose, as often as we reasonably require. We must be given authorization to obtain medical reports, copies of records, and information with respect to loss of salary, wages, tips, commissions, fees and other earnings. Before we pay any Income Continuation Benefits, we may require an injured person to give us

reasonable proof of that person's inability to work. CP 87.

...

Part VI-Underinsured Coverage-Coverage SS

...

Proof of Claim; Medical Reports

...

The insured person may be required to take physical examinations by physicians we choose, as often as we reasonably require. We must be given authorization to obtain medical reports and copies of records. CP 91.

The provisions from the policy's PIP and UIM coverages permit Allstate to request an IME as a condition to receiving coverage. Kim was seeking first party coverage pursuant to two policy coverages with the same pre-condition. Kim appears to be suggesting that Allstate is required to obtain two IMEs or one for her PIP coverage and one for her UIM coverage. That would be an absurd and inefficient result. Such a result would require that an insurer obtain two expert opinions in a construction defect case regarding the cause of damage when investigating coverage for a structural claim and personal property claim. Both arise out of the same policy, but are separate coverages. No Washington court has ever made such an absurd ruling.

More importantly, requiring an insurer to keep first party coverages in the same claim distinctly separate would allow an insured to file a false claim on multiple coverages. It would be up to the carrier to try and catch all false claims. This would likely result in an insured collecting on certain

coverages despite the material misrepresentations made in the claim. The purpose of the misrepresentation exclusion appearing in a policy in the general conditions is not an accident; this provision is intended to apply to the entire policy and to all coverages in every claim.

The cases of *Ellwein v. Hartford*, 142 Wn.2d 766, 15 P.3d 640 (2000) and *Harris v. Drake*, 116 Wn. App. 261, 65 P.3d 350 (2003) are not applicable to this situation. Neither case addressed a situation where a first party insured was seeking coverage for PIP and UIM coverages. In such a situation, there is no adversarial third party liability to consider. Rather, it is a relationship between an insured and her insurer. Requiring an insurer to duplicate its efforts when only its first party insured is involved is not supported by any case law or the policy of insurance. As a result, Allstate did not improperly merge the PIP and UIM files.

10. Kim Waived Any Objection To the Investigation of Her PIP and UIM Claims

Regardless of any objection that Kim may have to Allstate's investigation into her PIP and UIM claim, any objection was waived. Kim was notified through Allstate's correspondence dated October 4, 2005, that Allstate was investigating her PIP and UIM claims jointly. CP 194. An IME was requested for both claims. Her recorded statement and examination under oath were requested for both claims. Both Kim's PIP and UIM claims

were jointly denied in January 2006. CP 117. No objection was ever raised by Kim's counsel. At all times throughout Allstate's investigation into her claim, Kim has been represented by an attorney. In fact, Kim did not voice any objection with Allstate's investigation of the PIP and UIM coverages until March 2007, almost two years after she made the claims. CP 208. Kim's failure to address her objections until after Allstate completed its investigation is a waiver of any potential objections.

Washington courts have held that waiver is an intentional relinquishment of a known right. *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980). A party intentionally relinquishes a right if his actions are "inconsistent with any intent other than to waive it". *Spokane County v. Specialty Auto*, 153 Wn.2d 238, 248, 103 P.3d 792 (2004); *Wagner v. Wagner*, 95 Wn.2d at 102. Waiver may also be implied by a party's actions that indicate an intent to waive. *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 612, 94 P.3d 961 (2004); *Wagner v. Wagner*, 95 Wn.2d at 102; see also *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998).

It is undisputed that Allstate disclosed to Kim in October 2005 its concurrent investigation into Kim's PIP and UIM claims. CP 194. Kim's failure to raise any objection to Allstate's investigation until March 2007 is a waiver of any objection to the investigation of the PIP and UIM claims.

Kim failed to ever raise an objection until long after the investigation was complete and the claim was denied. It would be inequitable to allow Kim to now argue that Allstate improperly investigated her claim.

11. Kim Has Not Satisfied All Elements of A CPA Claim

Kim has made no attempt to establish all required elements of a CPA claim. As a result, her CPA claims must be dismissed. To prove a CPA violation, Kim must establish the five elements set forth in *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). If a party fails to establish all five elements of the *Hangman Ridge* test, the court must dismiss the CPA claim. *Sign-O-Lite Signs v. DeLaurenti Florists*, 64 Wn. App. 553, 825 P.2d 714 (1992); *Van de Grift v. Skagit County*, 59 Wn. App. 545, 800 P.2d 375 (1990). The five *Hangman Ridge* elements that Kim must establish are:

1. An unfair or deceptive act or practice;
2. Occurring in trade or commerce;
3. That impacts the public interest;
4. Injury to her business or property; and
5. The injury was proximately caused by the unfair or deceptive act.

Hangman Ridge, 105 Wn.2d at 784-85.

Whether an act or practice is actionable under the CPA is a question of law. *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 260, 928 P.2d 1127 (1996), *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997); *Blake v.*

Federal Way Cycle, 40 Wn. App. 302, 309, 698 P.2d 578 (1985); *Keyes v. Bollinger*, 31 Wn. App. 286, 640 P.2d 1077 (1982).

Primarily, Kim cannot establish that Allstate committed an unfair or deceptive act or practice. Kim makes bare assertions regarding what she considers to have been unfair. However, she provides no case law that supports any claim that Allstate's investigation in any way constituted an unfair or deceptive act. Rather, Kim was the party who committed the deceptive acts through her misrepresentations.

Additionally, Kim has not established that she suffered any damage to business or property as a result of any part of Allstate's investigation. Kim has not even attempted to demonstrate any damages to business or property, as is required by the *Hangman Ridge* test. Kim has not submitted any declaration identifying damages nor is there any deposition testimony in this regard. As a result, Kim cannot sustain her CPA claim and this court should dismiss her CPA claims. See *Van de Grift v. Skagit County*, 59 Wn. App. 545, 800 P.2d 375 (1990); *Sign-O-Lite Signes v. DeLaurenti Florists*, 64 Wn. App. 553, 825 P.2d 214 (1992).

Finally, reasonableness of an insurer's conduct is a complete defense to a claim of an unfair act or practice under the CPA. *Starzewski v. Unigard Ins. Co.*, 61 Wn. App. 267, 810 P.2d 58 (1991); *Transcontinental Ins. Co v.*

Washington Pub. Util. Dist., 111 Wn.2d 452, 760 P.2d 337 (1988); *McLanahan v. Farmers Ins. Co of Washington*, 66 Wn. App. 26, 831 P.2d 160 (1992). Kim bears the burden of establishing that Allstate's investigation and denial of her claims for PIP and UIM benefits was unreasonable, frivolous or unfounded. See *Smith v. Safeco*, 150 Wn.2d478, 78 P.2d 1274 (2003). Absent such a showing, there can be no finding that Allstate violated the CPA.

Both Allstate's investigation and denial of Kim's claims were reasonable. Allstate has carefully outlined its investigation into Kim's claims. This investigation revealed that Kim misrepresented her wage loss claim and the nature and extent of her injuries. Allstate's denial was based on these misrepresentations. Kim has made no attempt to establish that this investigation and denial was unreasonable, frivolous or unfounded. As a result, her CPA claims must fail.

12. Kim Not Only Mis-cites the Law, As Identified Above, But Also Mis-Cites to the Factual Record

As identified above, Kim mis-cited the law multiple times in her responsive briefing. In addition, Kim mis-cites to the factual record. Specifically, those are identified as follows:

1. On page 2, Kim cites to page 393 of the clerk's papers as supporting her claim that Allstate impermissibly merged the PIP and UIM

files. Page 393 is blank.

2. On page 3 of her brief, Kim cites to pages 310-349 of the clerk's papers to support her claim that her "many other injuries" were examined by Tacoma General. These documents do not identify any other injuries. Rather, they are copies of the medical records documenting her examinations that revealed no additional objective injuries.

3. On page 4 of her brief, Kim cites to CP 399 as supportive of her claim that Allstate refused to pay certain bills or provide certain documents. However, CP 399 is a letter from Kim's attorney requesting documentation, not a communication from Allstate that indicates any refusal to provide information or pay bills.

4. On page 5, Kim again cites to CP 393. This time, the citation is meant to support Kim's claim that Allstate concealed certain information from Kim. As stated above, CP 393 is a blank page.

5. Also on page 5, Kim claims that CP 351 and 399 are portions of a recorded interview. However, CP 351 is a letter from Allstate to Kim's attorney. CP 399 is a copy of a letter from Kim's attorney to Allstate.

6. On page 11, Kim cites, yet again, to CP 393. On this occasion, this citation to CP 393 is meant reference a letter from Allstate. CP 393 is a blank page.

7. On page 11, Kim also cites to CP 396 and 397 to support the claim that Allstate concealed information from Kim. CP 396 and 397 are also identified here as revealing that Allstate was taking Kim's EUO to "see if she would make any misrepresentations." This is simply untrue. CP 396 and 397 is a letter from Allstate to Kim scheduling her EUO and requesting the production of documentation.

13. This Court May Consider the Videotape Evidence Submitted with the Declaration of Maucotel

Allstate submitted a declaration of John Maucotel, the investigator who captured Kim working on surveillance tape. CP 242-243. In conjunction with this declaration, Allstate submitted the actual video tape of Kim working when she claimed she was unable and moving without restrictions despite claims to the contrary.

The United States Supreme Court recently held in *Scott v. Harris*, that when a party's factual account of a case is supported by videotape evidence, the Court must adopt that version of the facts. *Scott v. Harris*, 127 S. Ct. 1769 (2007). In *Scott*, the Court was presented with a factual scenario in which a party evading police sued a police officer after a car pursuit resulted in his serious injuries. The Plaintiff's version of events included an open road with no danger to other persons during the car chase. However, video surveillance indicated that this was not the case and, in fact, there were

numerous cars in the roadway and the Plaintiff's driving presented a serious danger to a number of other individuals. The Court concluded that the video evidence was conclusive to support the police officer's factual account of the facts. As a result, the facts identified in the video were taken as indisputable for purposes of a summary judgment motion. *Scott*, 127 S. Ct at 1776.

Similarly, Allstate presented indisputable video evidence of Kim working during a time when she claimed unable. The video evidence also includes indisputable evidence that Kim was moving, walking and driving without limitations despite her claims to the contrary during her IME held the next day. See video submitted with CP 242-243. As a result, the video tape evidence must be considered as indisputable evidence in this case.

Kim claims that the video tape is not properly before this Court because it was not considered by the trial court. This is incorrect. The videotape and declaration of Mr. Maucotel are part of the record for this Court to consider. See CP 242-243. As a result, this Court may consider all evidence submitted to it, including this videotape.²

14. Conclusion

Kim has failed to refute the facts that irrefutably support the

2

Counsel for appellant has been in contact with the trial court to get the video to the Court of Appeals in order to obtain the proper clerks papers' citation. When this has been done, appellant intends to file an amended reply brief that include the proper citation.

conclusion that she intentionally misrepresented a material fact regarding her claims for coverage. Because she intentionally misrepresented material facts to Allstate, the policy of insurance precludes coverage for her PIP and UIM claims. As a result, the trial court erred in its ruling on Allstate's motion for summary judgment; no issue of fact remains regarding these misrepresentations.

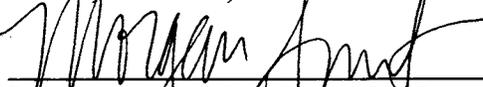
Additionally, because Allstate's investigation and denial of Kim's claim was reasonable, Kim cannot maintain an action for a CPA violation. Regardless, once an insured misrepresents a material fact regarding a claim, she cannot bring a CPA violation. Finally, Kim cannot establish all five elements of the *Hangman Ridge* test required to bring a CPA claim. As a result, the trial court erred in its ruling on Kim's cross-motion for summary judgment; no issue of fact remains that Allstate did not violate the CPA.

Accordingly, all of Kim's claims may properly be dismissed by this Court.

DATED this 8 day of October, 2008.

Respectfully Submitted,

COLE, LETHER, WATHEN & LEID, P.C.



Rory W. Leid III, WSBA #25075

Morgan Emmerton Smith WSBA #37954

Attorneys for Petitioner

NO. 37256-8-II

Pierce County Cause No. 07-2-04911-3

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

KI SIN KIM,
individually,

Plaintiff/Respondent,

v.

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Defendant/Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 OCT -8 PM 1:44
STATE OF WASHINGTON
BY  DEPUTY

PROOF OF SERVICE

COLE, LETHER, WATHEN & LEID, P.C.
Rory W. Leid III, WSBA #25075
Morgan Emmerton Smith, WSBA #37954
Attorneys for Petitioner
Allstate Insurance Company

1000 Second Avenue, Suite 1300
Seattle, WA 98104-1972
Telephone: (206) 622-0494

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the following documents: **REPLY BRIEF OF APPELLANT ALLSTATE INSURANCE COMPANY and PROOF OF SERVICE** on the following persons and manner indicated:

1. State of Washington Court of Appeals, Division II
950 Broadway, #300
M/S TB-06
Tacoma, WA 98402

By hand delivery by ABC Legal Messengers

2. Doug Wilson
Attorney for Plaintiff/Respondent
Law Office of Douglas E. Wilson
520 Pike Street, Suite 1520
Seattle, WA 98101

By hand delivery by ABC Legal Messengers

DATED this 8th day of October, 2008.


Marla Thomas
Marla Thomas