

NO. 293807-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DENNIS R. BALDWIN, et. ux., d/b/a B & D CONSTRUCTION;

Plaintiffs;

v.

THOMAS J. SILVER and ROBIN G. SILVER, husband and wife;

Appellants;

v.

FARMERS INSURANCE OF WASHINGTON;

Respondent.

APPELLANTS' OPENING BRIEF

George R. Guinn, WSBA #19573
Attorney for Appellants

George R. Guinn, PS
605 East Holland Avenue
Suite 113
Spokane, WA 99218
509-464-2410 phone
509-464-2412 fax

NO. 293807-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DENNIS R. BALDWIN, et. ux., d/b/a B & D CONSTRUCTION;

Plaintiffs;

v.

THOMAS J. SILVER and ROBIN G. SILVER, husband and wife;

Appellants;

v.

FARMERS INSURANCE OF WASHINGTON;

Respondent.

APPELLANTS' OPENING BRIEF

George R. Guinn, WSBA #19573
Attorney for Appellants

George R. Guinn, PS
605 East Holland Avenue
Suite 113
Spokane, WA 99218
509-464-2410 phone
509-464-2412 fax

TABLE OF CONTENTS

TABLE OF CASESi-ii

INTRODUCTION pg 1

ASSIGNMENT OF ERRORS pg 2

STATEMENT OF CASE pg 9

LEGAL ARGUMENT - ASSIGNMENT OF ERRORS pg 10

SUMMARY JUDGMENT pg 15

LEGAL ARGUMENT - SUMMARY JUDGMENT pg 30

CONCLUSION..... pg 32

TABLE OF CASES

RULES OF THE APPELLATE COURT

RAP Rule 10.4.....1
RAP Rule 18.1.....33

RULES OF SUPERIOR COURT

LCR Rule 16(e).....10
CR Rule 56(c).....11
CR Rule 56(e).....12

RULES OF CODE OF JUDICIAL CONDUCT

Canon 1.....13
Rule 1.2.....13
Comment 513
Canon 2.....14
Rule 2.2.....14
Rule 2.3.....14
Comment 214
Rule 2.6.....15
Comment 115

CASES CITED

Smith v. SAFECO Insurance Company, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003);
Overton v. Consol. Ins. Co., 145 Wn.2d 417, 433, 38 P.3d 322 (2002).....18

Unigard Ins. v. Leven, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999).....24, 25

Truck Ins. Exch. v. Vanport Homes, 147 Wn.2d 751, 762, 58 P.3d 276 (2002).....25

Grange Ins. Co. v. Brosseau, 113 Wn.2d 91, 93-94, 776 P.2d 123 (1989).....25

Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719
P.2d 531 (1986).....28

Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990).....30

Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)30

Balise v. Underwood, 62 Wn.2d 195, 200, 381 P.2d 966 (1963)30-31

Olympic Steamship.....28

Sharon Anderson v. State Farm Mutual Ins. Co., 101 Wash.App. 32331

Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).31

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

DENNIS R. BALDWIN, et. ux.,
d/b/a B & D CONSTRUCTION;

Plaintiffs;

v.

THOMAS J. SILVER, et ux.,;

Appellants;

v.

FARMERS INSURANCE OF
WASHINGTON;

Respondent.

NO. 293807-III

APPELLANTS' OPENING BRIEF

I. INTRODUCTION

COME NOW, Appellants Thomas J. and Robin G. Silver, husband and wife, by and through their attorney of record, George R. Guinn, with their opening Brief on Appeal, pursuant to RAP Rule 10.4.

II. ASSIGNMENT OF ERRORS

Appellants Thomas J. and Robin G. Silver believe the Pend Oreille County Superior Court erred in granting summary judgment against the Silvers' remaining claims of Failure to perform under the Insurance Contract; Bad Faith Insurance Practices; and Consumer Protection Act Violation(s) against Farmers.

The issues in this matter revolve around five critical questions:

1) Should the Silvers' claims against Farmers have been dismissed at summary judgment when the trial court judge failed to allow counsel for the Silvers' to argue at summary judgment?

Mr. Guinn, counsel for the Silvers, was not allowed to present full argument at summary judgment. At the beginning of Mr. Guinn's opening argument in response to Farmers argument supporting its lengthy twenty-five page Motion for summary judgment (CP at 103-127), the trial court cut Mr. Guinn off and said "You know, Mr. Guinn, I think I got to limit you to what was filed in response to the motions here." (RP at 8, lines 11-12). When Mr. Guinn resumed argument moments later, the judge said "Let me have you cut to the chase ..." (RP at 13), when the very issues counsel was trying to argue were contained within the pertinent summary judgment pleadings and attachments. Instead of letting Mr. Guinn continue, the judge kept cutting Mr. Guinn off or asking pointed questions

without allowing Mr. Guinn to respond (RP at 14-15).

Thereafter, at the hearing for the Silvers' Motion for Reconsideration (CP at 483-486), the judge states with reference to her prior statements at the summary judgment hearing, "I don't think it [the court] was disrespectful of Mr. Guinn. It [the court] did ask Mr. Guinn at one point to focus on the issue *that was foremost in the court's mind which is often what I do...*" (RP at 31, lines 2-3) and "...we have an allegation that the court cut Mr. – Mr. Guinn off 'More than one occasion, counsel was stopped short of his argument, told to cut to the chase.' well, yeah, I – I did ask him several questions throughout and one time I did ask him to cut to the chase *of the issue on my mind as I have indicated.*" (RP at 31, lines 21-22). (Emphasis added)

Farmers' was not limited in any fashion while giving argument and reply, however, Mr. Guinn was not allowed to argue.

2) Should the Silvers' claims against Farmers have been dismissed at summary judgment when the trial court refused and failed to review all pertinent pleadings and exhibits within the record before making its decision?

During Mr. Guinn's argument at summary judgment, he was attempting to show the court specific evidence supporting the Silvers' claims against Farmers. Mr. Guinn was attempting to direct the court to a

specific document within in the pertinent pleadings for summary judgment (Declaration of Robin Silver, CP at 87-90). Instead, Judge Baker cut Mr. Guinn off and would not even let him get to the pertinent document (RP at 11-12).

On another occasion within Mr. Guinn's argument, he attempts to direct the court to evidence within the documents provided for summary judgment regarding deck damage. Again, the court does not allow Mr. Guinn to point to the record regarding testimony supporting deck damage. Instead the judge states "Let me have you cut to the chase on – on one thing that Mr., um, Neal raised and that is proof of any kind of damages of what their loss was over and above what – their property loss was over and above what has been paid?" (RP at 13-14) and goes on with a hypothetical situation. The judge then states "What evidence is there of the damage other than *a bald statement by Ms. Silver that the deck cost them ten thousand dollars - ...*" (RP at 14). When Mr. Guinn attempts to point to specific evidence in the record, the Declaration of Stephanie Ries (CP at 20-22), Exhibit 1, Farmers' First Interrogatories and Requests for Production (the actual numbers, CP at 42-43), Judge Baker again cuts him off, not allowing him to point the court to the evidence within the record (RP at 14). (Emphasis added)

3) Should the Silvers' claims against Farmers have been dismissed at summary judgment when the trial judge refused to allow argument and supporting evidence that was within the record regarding false and misleading representations to the court by Farmers regarding payment of claims?

While Judge Baker was addressing the parties with her findings after argument, Mr. Guinn attempts to point the court to a specific instance wherein Farmers has made a false and misleading representation to the court, for clarification of her interpretation of the record and obviously, to focus on a disputed material issue of fact for trial (RP at 20-21, lines 17-12). Mr. Guinn asks the court "are you including Mr. Delay's fees in calculating the double payment to Farmers?" (RP at 20, lines 20-21) In response, the court states "No. No. No. I'm not."... *"I'm going on what was in Mr. Neal's declaration."* *"Mr. Neal's declaration. So it's, uh – it is a – it did not include attorney fees. It's what they paid out on the - to B&D."* (RP at 20-21). Mr. Neal for Farmers then states "Uh, the claim was settled before I had anything to do with the case." "I was looking at the numbers, estimates and checks." (RP at 21) And Judge Baker, instead of looking at the pleadings in front of her or asking Mr. Neal to clarify for the record, states *"I don't think that it did, but be that as it may,..."* (RP at 21, line 12). (Emphasis added)

Mr. Guinn again addresses the issue of Farmers' misrepresentation at Reconsideration (RP at 25, lines 3-11) and the Court's acceptance of it. "One final – one of the things that Farmers has claimed in the last summary judgment motion is that they paid three times the value of the claim. I mentioned it to the court at that time and I'll mention it again, they didn't pay three times the value of the claim to the Claimant. They paid over four thousand dollars in attorneys' fees to the underlying Plaintiff as part of a settlement as attorney's fees," (RP at 25, lines 3-8). The court refuses Mr. Guinn's argument on this matter, stating "... I don't see any basis for a reconsideration of my previous ruling. ... Mr. Guinn threw up a question of 'Where do you get the figures and so on...' *and I really – I really think that the record speaks for itself.*" (RP at 27, lines 11-14). (Emphasis added)

Instead of taking the matter under consideration to see if the record is accurate, Judge Baker refuses to reconsider. Had the court reconsidered, Judge Baker would see that the record reflected specific evidence that in fact the Silvers were not double or triple paid, not unjustly enriched in any form and in fact, Farmers did mislead the court regarding the more than four thousand dollars in attorney fees paid to the attorney for B&D Construction in settlement after Farmers originally failed to pay that contractor, thus, generating the underlying lawsuit (CP

at 331, lines 16-21).

4) Should the Silvers' claims against Farmers have been dismissed at summary judgment when the trial court judge acknowledged at least one genuine issue of material fact in dispute remained and still granted summary judgment dismissal to Farmers?

In the court's ruling on summary judgment, the judge specifically states, "The Silvers have not come forward with any proof of additional damage. *Yes, it's true that the seven hundred and some odd dollar check did not apparently reach them for purposes of summary judgment. It is one of those perfect examples of a fact that is not material to the question of summary judgment.*" (RP at 16, lines 22-26). And then at the end of the court's ruling, the judge again states "So, um, *that seven hundred dollars was perhaps in dispute*, but an additional way more than seven hundred dollars was paid out. So that's where we end up with that." (RP at 21, lines 18-20). And then finally, the court again, states, "Um, the fact is yes, there is that seven hundred dollars that they – for purposes of summary judgment, the Silvers did not receive in the mail." (RP at 27, lines 21-22). (Emphasis added)

5) Should the Silvers' claims against Farmers have been dismissed at summary judgment when the trial judge exhibited a personal prejudice against counsel for the Silvers after having been

previously reversed by the Court of Appeals, Division III, in a unanimous, Published Opinion on this same case?

On or about July 14, 2009, Mr. Guinn was preparing to try another case at the Pend Oreille County Superior Court under Cause No. 06-2-00063-0. Mr. Guinn was representing the Plaintiffs in this particular matter and the parties had assembled in Judge Baker's chambers (the trial judge) prior to the start of day one of trial, and were discussing pretrial motions. Judge Baker stated to counsel for the Defendants with Mr. Guinn and associate attorney Brett T. Sullivan present, "Mr. Guinn recently got me reversed at the Court of Appeals." Judge Baker was referring to the Silvers' case at bar. Mr. Guinn made light of the situation and discussions regarding pretrial motions on this particular case continued and in fact, the parties settled the litigation in chambers moments before a jury was called.

It was not until Farmers brought their second Summary Judgment motion against the Silvers for the remaining claims in May, 2010 (CP at 103), and Mr. Guinn was again in front of Judge Baker that it became clear at the summary judgment hearing that Judge Baker had formed a prejudice against Mr. Guinn as outlined above.

There can be no other reason for Judge Baker to make the remarks she did, refuse to allow Mr. Guinn to present his case and evidence within

the pleadings or, and most importantly, during Reconsideration argument, not reverse herself based on the substantiated evidence that there was at least one genuine issue of material fact in dispute for trial.

III. STATEMENT OF THE CASE

The Silvers filed an insurance claim with Farmers Insurance as a result of the damages caused by a fire that occurred in their home on or about April 3, 2006. The Silvers allowed multiple contractors, including B&D Construction and ServiceMaster to perform repairs on their home based on their reliance in Farmers' contractual promise to pay, and letters indicating the same.

Dennis and Deborah Baldwin, husband and wife, d/b/a B&D Construction, commenced an action against the Silvers on or about August 9, 2006, alleging the Silvers were liable to them for damages arising and relating to work performed as a result of the fire loss (CP at 174-181).

The Silvers cross-claimed against Farmers Insurance alleging Breach of Contract; Promissory Estoppel; Bad Faith Insurance Practices; and Violation of the Consumer Protection Act, on or about September 20, 2006 (CP at 195-199).

Farmers moved for summary judgment on the Silvers' cross-claim of promissory estoppel. The trial court agreed and granted summary

judgment dismissal to Farmers based on judicial estoppel.

The Silvers moved for Reconsideration of the Order granting summary judgment to Farmers. The court found no error in granting summary judgment to Farmers based on judicial estoppel.

The Silvers appealed the judicial estoppel issue to the Division III, Court of Appeals and the trial court was reversed in a unanimous Published Opinion on November 18, 2008 (CP at 415-419).

Finally, in relevant history pertinent to this Appeal, Farmers moved for a second Summary Judgment on the Silvers' remaining claims on May 10, 2010 (CP at 103). The trial court heard full argument from Farmers and limited argument from the Silvers and granted summary judgment dismissal to Farmers on all three of the Silvers' remaining claims in an Order dated July 29, 2010 (CP at 480-481).

The Silvers moved for Reconsideration (CP at 483-486) of the Order granting summary judgment to Farmers (CP at 480-481) because the court erred in granting the summary judgment dismissal to Farmers as outlined in the Assignment of Errors. The trial court found there was no error in granting a second summary judgment to Farmers.

IV. LEGAL ARGUMENT - ASSIGNMENT OF ERRORS

Pend Oreille County Superior Court LCR 16, Pretrial Procedures and Formulating Issues, (e) Methods, (5) Motion Calendar Hearing

Procedures, states in relevant part: “the Law and Motion calendar will commence at times designated in the respective county’s court calendar as distributed by the court administrator and County Clerk’s offices. Matters shall be noted for the particular time designated in the court calendar. Agreed orders and defaults will be heard at the beginning of the docket. **Motions other than summary judgment shall be limited to ten (10) minutes each side.** Motions which will exceed the time limit of this rule, if allowed by the motion judge, will ordinarily be placed at the end of the motion docket. The case at bar involved a second summary judgment motion. Said motions are not subject to the 10 minute rule regarding argument. (Emphasis added)

Mr. Guinn was not allowed to present a full argument in response to summary judgment, was cut off at multiple points by Judge Baker during his argument and because of the court’s actions, a summary judgment dismissal was granted against his clients, the Silvers.

CR 56 (c) states in relevant part: “...The judgment sought shall be rendered forthwith 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. A summary judgment, interlocutory in character, may be rendered on the issue of**

liability alone although there is a genuine issue as to the amount of damages.” (Emphasis added)

In this case, not only is there at least one material issue for trial, the issue of damages is clearly in dispute. At a minimum, the court could have provided an interlocutory judgment order on the issues of the damages and misrepresentation to the court. The court however chose to summarily dismiss all claims.

CR 56 (e) Form of Affidavits; Further Testimony; Defense Required, states in part: “Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”... “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, **but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.** (Emphasis added)

Mr. Guinn, counsel for the Silvers, made multiple attempts to provide argument to the court via the sworn affidavit of Robin Silver (CP at 87-90), on several issues of material fact. The court refused to acknowledge it, and at one point stated that one of Mrs. Silvers’

statements was “*a bald statement by Ms. Silver that the deck cost them ten thousand dollars - ...*” (RP at 14). Further Judge Baker didn’t even acknowledge the Declaration until it was brought up at Reconsideration by Mr. Guinn. Thereafter, Judge Baker instructs Mr. Neal, counsel for Farmers, to prepare an Amended Order (CP at 503-504) granting summary judgment to include the fact that she reviewed the Declaration of Robin Silver (RP at 33-34, lines 8-18). (Emphasis added)

The Washington State Court Rules Code of Judicial Conduct provides as follows: Canon 1 - A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 1.2, Promoting Confidence in the Judiciary:

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and **impartiality** of the judiciary, and **shall avoid impropriety and the appearance of impropriety**.

Comment [5] **Actual improprieties include violations of law, court rules, or provisions of this Code.** The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct

that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. (Emphasis added)

And, Canon 2 provides, A judge should perform the duties of judicial office impartially, competently, and diligently.

Rule 2.2, Impartiality and Fairness:

A judge shall uphold and apply the law, and shall perform all duties of judicial office **fairly and impartially**.

Additionally, Rule 2.3, Bias, Prejudice, and Harassment provide:

(A) A judge shall perform the duties of judicial office, including administrative duties, **without bias or prejudice**.

(B) **A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice**, or engage in harassment, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

Comment [2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and

others an appearance of bias or prejudice. **A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.** (Emphasis added)

And finally, Rule 2.6, Ensuring the Right to Be Heard provides:

(A) **A judge shall accord to every person who has a legal interest in a proceeding,** or that person's lawyer, the right to be heard according to law. (Emphasis added)

Comment [1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

In the case at bar, the Silvers were unduly prejudiced by Judge Baker's bias and prejudice against Mr. Guinn. Mr. Guinn was not given opportunity to fairly represent his clients in summary judgment or reconsideration.

V. SUMMARY JUDGMENT

As argued above, Judge Baker dismissed all of the Silvers remaining claims (Breach of Contract - Failure to perform under the Insurance Contract; Bad Faith Insurance Practices; and Consumer Protection Act Violation) via summary judgment dismissal to Farmers. The Silvers attempted to provide argument and documentation in support thereof via Response (CP at 390-410) and Affidavit of George R. Guinn

(CP at 411-468) to Farmers Motion for Summary Judgment (CP at 103-127 and CP 87-90).

Rather, Judge Baker refused to accept any argument from Mr. Guinn regarding the three remaining claims, or even the issue of spoliation, which Judge Baker rendered “immaterial at this point” (RP at 19, line 3) at summary judgment and later declared at consideration, “Um, and so without even having to get the spoliation issue, and I won’t revisit that but – because it’s not material, it’s not – and it’s moot when I grant summary judgment.” (RP at 30, lines 10-12), and concentrated solely on Mr. Guinn supplying the court with a dollar amount of damages above what Farmers supposedly paid to the Silvers on their claim for damages (RP at 13-14). In fact, Mr. Guinn was actually badgered by the judge who refused to let him present argument but instead insisted on a dollar amount of damages (RP 13-15).

1. Breach of Contract - Failure to perform under the Insurance Contract.

Under the terms of the insurance policy with the Silvers, Farmers was required to pay for all repairs necessitated by a covered cause of loss. Farmers claimed in its motion that it had “paid all invoices submitted for the repair work.” The facts do not support this claim.

Farmers made a partial payment directly to ServiceMaster for \$1,534.32, leaving the balance of \$1,210.21, (Declaration of Eric J. Neal,

Exhibit P, Declaration of Kelly Holt in Support of Third-party Defendant Farmers' Motion for Summary Judgment, CP at 330). Per Farmers instruction, the Silvers supplied Farmers with the invoice from ServiceMaster for \$1,210.21 after the project was completed. The Silvers and their counsel later learned that Farmers settled with ServiceMaster during the week of October 8, 2007, in the amount of \$700.00. This date is of importance as Farmers had already presented their first Summary Judgment Motion to this Court stating they paid ALL contractors. When they realized their error, they made a side deal with ServiceMaster while their Summary Judgment Motion was pending with the Court. The settlement of the ServiceMaster claim was of course not made known to the Silvers or their counsel (Affidavit of George R. Guinn in Support of the Silvers' Response to Farmers Motion..., Exhibit E, Declaration of Angela M. Madrid..., CP at 427-433).

The Silvers had to obtain new homeowners insurance. After finally finding an insurer to insure them, they were told they would have to tear down their deck and fill in the area as it was a "safety hazard" and they could not be insured otherwise. This of course, was done at their own expense and time, using their own tools and materials (Declaration of Stephanie M. Ries, Exhibit 1, Farmers' First Interrogatories and Requests for Production with Answers Thereto, pg 21-22, CP at 42-43).

Judge Baker, in her ruling on summary judgment continually discussed that the Silvers have made no showing of damages on the deck (RP at 16, lines 6-14), however, as argued above, the Silvers attempted to, and were not allowed to present the evidence regarding deck damage (Declaration of Stephanie M. Ries, Exhibit 1, Farmers' First Interrogatories and Requests for Production with Answers Thereto, pg 21-22, CP at 42-43). More importantly, Farmers argued a whole myriad of issues in their Motion for summary judgment (Farmers' Motion for Summary Judgment, CP at 103) and the Silvers argued in response (Tom and Robin Silver's Response to Farmers' Motion..., CP at 390-410). The only thing Judge Baker ruled on in the whole breach of contract claim was there was no proof of damages RP at 16-17). Judge Baker did not address the other arguments in Farmers briefing or the Silvers.

2. Bad Faith Insurance Practices. The Silvers presented a prima facie case showing of bad faith on the part of Farmers. It was broken down as follows:

A. Farmers Acted in Bad Faith by Failing to Act in a Reasonable Manner:

“To succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded.” *Smith v. SAFECO Insurance Company*, 150 Wn.2d 478, 484,

78 P.3d 1274 (2003); *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002).

Farmers' failure to fully satisfy its duty under the insurance contract was unreasonable and unfounded and constituted bad faith. The insurance contract requires that Farmers pay for repairs on a covered loss. The fact that Farmers made a side settlement with ServiceMaster after filing a Summary Judgment Motion with this Court claiming it paid all contractors when it had not, constituted bad faith. The fact that Farmers didn't bother to notify the Silvers or their counsel constituted bad faith.

In this case, as stated above, Farmers failed to pay ServiceMaster as required under the contract until mid October, 2007, unbeknownst to the Silvers and after filing their first Summary Judgment motion. Additionally, Farmer's only paid B&D Construction after they brought suit against Farmers and the Silvers. Finally, Farmers never fully settled or closed this claim, leaving the issues of the deck damage and the un-received and un-cashed checks unresolved. Even in deposition the Silvers continue to complain to counsel for Farmers about these issues. These breaches of the contractual duty under the insurance contract were unreasonable and constituted bad faith.

The way that Farmers handled the claim with the Silvers was unreasonable. The issuances of payments in this case were handled in a

negligent and less than businesslike manner. The first check that Farmers issued was to acknowledge the Silvers claim and advise the Silvers that “Farmers Insurance of Washington will issue payment payable to “Robin Silver and B&D Construction for all reasonable and necessary repairs in which you complete pertaining to this loss.” (Affidavit of George R. Guinn in Support of the Silvers’ Response to Farmers Motion..., Exhibit F, Farmers letter dated 04/13/06, CP at 434) Thereafter, the first check from Farmers (Declaration of Eric J. Neal, Exhibit P, Declaration of Kelly Holt in Support of Third-party Defendant Farmers’ Motion for Summary Judgment, check in dated 04/28/06, CP at 334) was payable solely to the Silvers with no instructions or explanation as to how or where the funds were to be utilized, only an estimate of the repairs (Declaration of Eric J. Neal, Exhibit G, Farmers letter dated 04/28/06, CP at 242). This letter is critical to the Silvers claims as it states in part:

“We appreciate the opportunity to serve your insurance needs.

A check for the amount of \$3,438.17 representing full payment of your claim is enclosed.

Cashing this check does not mean you are releasing your rights to recover und the terms and conditions of your policy.”

Nowhere in this letter does it instruct the Silvers what to do with these funds. The Silvers had their own costs (temporary housing for

Robin and the children, additional utility usage, and their own labor in repairs/cleanup) which at the point this initial check was sent had not been paid.

Farmers sent payments directly to the companies that the Silvers contracted with naming only the company on the checks in direct violation of their own Policy (Declaration of Eric J. Neal, Exhibit A, Farmers Policy, CP at 146). In their summary judgment motion Farmers highlighted text from the policy that indicated they **“shall adjust all losses with you. We shall pay you unless another payee is named in the policy...”** (Declaration of Eric J. Neal, Exhibit A, Farmers Policy, CP at 146) Farmer’s implies that the payment solely to the Silvers is in compliance with the language of the contract and therefore the Silvers should have known the money in the 4/28/06 check in the amount of \$3,438.17 was for particular contractors (Declaration of Eric J. Neal, Exhibit G, Farmers letter dated 04/28/06, CP at 242). Their payment of checks directly to contractors, solely in the name of the contractors, would seem to contradict that implication and/or directly violate their own contract (Declaration of Eric J. Neal, Exhibit A, Farmers Policy, CP at 146).

Farmers did send a check for child care dated 7/21/2006 payable directly to the Silvers. However, the Silvers never received any payment

for temporary housing for Robin Silver, the additional utility usage, or their labor. This directly contradicted Farmers claim that it had paid the Silvers for all invoices submitted (Declaration of Eric J. Neal, Exhibit A, Farmers Policy, CP at 146).

Additionally Farmers stated in its motion that “the evidence shows that not only did the Silvers receive every check, *they cashed these checks.*” While Farmers provided a copy of a letter sent July 27, 2006, that purports to include payment for the above claims with two different checks (\$654.43, \$70.00) (Declaration of Eric J. Neal, Exhibit J, CP at 262), they did not provide proof that those checks were ever received or cashed. In fact, neither party can provide copies of the supposed checks that were sent to the Silvers. Apparently they don’t exist.

Thereafter, in a letter dated November 16, 2006 (Affidavit of George R. Guinn in Support of the Silvers’ Response to Farmers Motion..., Exhibit G, Farmers attorney letter dated 11/16/06, CP at 435-436), Farmers’ attorney stated that “Farmers informed me that these checks were sent, but have not yet been cashed.” The fact that Silvers never received or cashed the two checks supports their claim that they never received them **or the letter that accompanied them** (Declaration of Eric J. Neal, Exhibit J, CP at 262-264). That letter was absolutely critical as it provided the only breakdown from Farmers of where Farmers thought

the money was supposed to go, yet Farmers never communicated that information to their insured's, and the supposed breakdown came in November, 2006, where in the check in the amount of \$3,438.17 which came in April, 2006.

Based on the way that Farmers issued payments in this matter, it was reasonable for the Silvers to assume that the initial payment payable solely to them was for reimbursement of their own costs in the matter. The fact that the Silvers never received or cashed two checks from Farmers should have created a duty for Farmers to investigate the claim further. Their actions in the issuance of payments, failure to communicate with the insured's, and in failing to investigate the claim were unreasonable and constituted bad faith.

B. Farmers Acted in Bad Faith by Failing to Defend the Silvers:

Farmers had a duty to defend the Silvers in B&D Construction's claim against them (Declaration of Eric J. Neal, Exhibit A, Farmers Policy, CP at 147) and failed to provide that defense. Mrs. Silver took her Complaint to her Farmers agent on the day she was served (Declaration of Robin Silver, CP at 89, lines 1-6). This failure constituted bad faith.

The duty of an insurer to defend "arises when a complaint against the insured, construed liberally, alleges facts which could, if proven,

impose liability upon the insured within the policy's coverage." *Unigard Ins. v. Leven*, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999). The repairs done by B&D Construction were within the policy coverage with Farmers. The suit brought by the B&D Construction, could certainly have imposed liability upon the Silvers and as such Farmers had a duty to defend. More importantly, Farmers also was served as a named defendant along with the Silvers, so Farmers KNEW the Silvers' had been sued.

Farmer's claimed that it had no duty to defend because the Silvers did not tender the claim. The policy with the Silvers does not expressly require the Silvers to tender the claim for defense; however Mrs. Silver did tender the defense. The Silvers filed a claim for the work done by B&D Construction with Farmers before the suit was initiated. This action, along with the fact that Farmers knew of the suit, put Farmers on notice that the Silvers thought this was a covered claim.

Farmers pointed to *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999) for the proposition that the Silvers must specifically ask the insurer to undertake the defense of the action. The *Leven* Court stated that, "an insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; the insured must affirmatively inform the insurer that its participation is desired." *Leven*, 97 Wn. App. at 427. Unlike the *Leven* case, the Silvers *already* filed a claim for coverage

on the amount sought in B&D Construction's claim and provided their agent a copy of the Complaint. Farmers cannot claim that they could not anticipate whether a claim would be made as the claim had already been made and Farmers was a named defendant along with the Silvers. The Silvers desire for Farmers to cover the claim and therefore participate in their defense is shown by the filing of the claim itself and delivery of the Complaint to their agent on the day they were served (Declaration of Robin Silver, CP at 89). Additionally, the *Leven* case required the insurer to prove prejudice to be relieved of its duty to defend. *Id.* at 427. Farmer's made no showing of prejudice.

Even if Farmers felt they were not liable to pay the amount of B&D's claim, the proper course of conduct would have been to file a reservation of rights while seeking a declaratory judgment to that effect. See *Truck Ins. Exch. v. Vanport Homes*, 147 Wn.2d 751, 762, 58 P.3d 276 (2002); *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 93-94, 776 P.2d 123 (1989). Farmers did not file a reservation of rights or seek a declaratory judgment.

Farmer's received a claim for the amount involved in the complaint by B&D and was aware of the suit itself. Unlike *Leven*, Farmers knew that the Silvers were seeking coverage for the amount involved in the complaint. That complaint could have imposed liability

against the Silvers and Farmers which terms were within the policy's coverage and therefore invoked a duty on Farmers to defend. Farmers' failure to meet that duty or to seek a reservation of rights constituted bad faith.

Most importantly, prior to commencing their cross-claim, the Silvers made Farmers aware of the lawsuit (Declaration of Robin Silver, CP at 89) and sought indemnification by Farmers for the plaintiffs' claims (Declaration of Stephanie M. Ries, Exhibit 2, Deposition of Robin Silver, CP at 81, deposition pgs 82-83, lines 12-18). Mrs. Silver went to see her Farmer's agent within minutes of being served with the lawsuit by B&D Construction. Their Farmers agent immediately got on the telephone to the claims office supervisor. While Mrs. Silver was at her agent's office, Judy looked up the Silvers' claim on their computer system and stated she could see some checks that had supposedly been issued to the Silvers. Again, the Silvers did not, and still have not received said checks and Farmers cannot, to this date find any evidence that ANYONE at Farmers sent the checks or anyone at the Silvers' home received and/or cashed said checks.

Farmers owed the Silvers a duty to defend and indemnify them against B&D Construction's claims pursuant to the coverage provisions of the policy. Farmer's failure to defend and hold the Silvers harmless from

any loss sustained due to B&D Construction's claim constituted a breach of the insurance policy.

C. The Silvers Proved Bad Faith Damages:

The Silvers damages flowing from Farmers bad faith include the money still owed to them for their labor, housing, utilities, attorney's fees for defense of the suit from B&D Construction, and attorney's fees in defense of Farmers' claims against the Silvers.

Had Farmers not paid off ServiceMaster with a settlement check in the amount of \$700.00 for an unpaid bill of \$1,210.21 in exchange for a Release barring ServiceMaster from working with the Silvers, and unbeknownst to the Silvers (Affidavit of George R. Guinn in Support of the Silvers' Response to Farmers Motion..., Exhibit E, Declaration of Angela M. Madrid..., CP at 427-433), that claim would have been part of the bad faith action.

Again, Farmers cancelled the Silvers homeowner's policy because "Insured failed to pay contractor after fire loss" (Affidavit of George R. Guinn in Support of the Silvers' Response to Farmers Motion..., Exhibit D, Cancellation Notice, CP at 425). The Silvers had to obtain new homeowners insurance. After finally finding an insurer to insure them, they were told they would have to tear down their deck and fill in the area as it was a "hazard" due to the fire damage and they could not be insured

otherwise. This of course, was done at their own expense and time, using their own tools and materials.

In her ruling, Judge Baker states “...in terms of their insurance contract, *they* [Silvers] *had a duty to pay* the contractors themselves. The insurance company had *no duty to pay* any of the insurance – any of the contractors. *It’s right there in the black and white of the contract, the policy.*” (RP at 18, lines 8-10). Judge Baker couldn’t be more wrong. The policy specifically states “14. Loss Payment. *We shall adjust all losses with you. We shall pay you* unless another payee is named in the policy. We shall pay within 60 days after a. we reach agreement with you, or b. a court judgment, or c. an appraisal award.” (Declaration of Eric J. Neal, Exhibit A, Farmers Policy, CP at 146) (Emphasis added)

3. Consumer Protection Act Violation.

A Consumer Protection Act claim requires:

1. An unfair or deceptive act or practice;
2. Occurring in trade or commerce;
3. That impacts the public interest;
4. Injury to business or property; and
5. The injury was proximately caused by the unfair or deceptive act. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).

Farmers breached its duty to pay for all repairs covered under the contract. Farmers breached its duty to defend the Silvers against B&D Construction. Farmers conduct in settling with ServiceMaster was an unfair AND deceptive act. Farmers' conduct of not investigating the claim, not communicating with the insured's and issuing payments to the Silvers and directly to creditors (in violation of their own policy) without explanation caused the Silvers a lot of confusion, was unreasonable and unfounded and constituted bad faith. Each one of these claims, described and defended in previous sections, constituted an unfair or deceptive act or practice by Farmers. Insurance transactions such as this occur in commerce and impact the public interest.

The Silvers suffered injury to their property sufficient to support a CPA claim. The Silvers damages are more than the costs and fees incurred in pursuing a CPA claim. The Silvers have costs and attorney's fees for defending against both B&D Construction and Farmers that are separate from the CPA claim. The Silvers have lost the use of their deck. As previously noted, Farmers cancelled the Silvers homeowner's policy because "Insured failed to pay contractor after fire loss", yet Farmers made a last hour settlement, after filing a Brief with the trial court stating they paid all claims. The Silvers were worried that according to Farmers, they owed money to ServiceMaster for their repair work. As previously

revealed it was not until October 17, 2007, that the Silvers were notified by their attorney, that Farmer's had settled with ServiceMaster. This of course was done "on the side", with no communication to the Silvers or their counsel.

Each of these damages flow directly from Farmers unfair or deceptive acts or practices. The Silvers have shown each of the elements necessary under *Hangman Ridge* maintain a Consumer Protection Act claim.

VI. LEGAL ARGUMENT – SUMMARY JUDGMENT

A. Summary Judgment Standard.

An order of summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990), citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Marincovich* supra at 274 (citing *Wilson*, at 437).

A court must deny summary judgment when a party raises a material factual dispute. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381

P.2d 966 (1963).

B. Attorney Fees and Costs.

Interestingly, Farmers' argument that this case does not fall within the *Olympic Steamship* exception makes the very argument that the Silvers use to support their claim for attorney fees.

The Washington Court of Appeals in *Sharon Anderson v. State Farm Mutual Ins. Co.*, 101 Wash.App. 323, states;

But Olympic Steamship is not applicable where the controversy is over the amount of, or denial of, a claim. (citing *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

The case at bar is neither about the "amount of, or denial of, a claim." It is much simpler than that.

1. This is about Farmers claiming to have paid a claim (for the deck) and the Silvers claiming that Farmers did not pay the claim, and
2. Farmers breaching their own contract, which states: Farmers will provide the following:

Additional Coverages

1 – debris removal

2 – necessary repairs

5 – emergency removal of property

3. Farmers claim that they paid the Silvers two checks, but have been unable to show proof that these checks were either issued or cashed by anyone, including the Silvers.

If nothing else, these are material issues of fact still in dispute and summary judgment should be denied based on these issues alone.

VI. CONCLUSION

The Silvers were not given a fair hearing and believe the trial court has erred in granting summary judgment to Farmers as follows:

- 1) The court failed to allow counsel for the Silvers' to fully argue at Summary Judgment;
- 2) The court refused and failed to review all pertinent pleadings and exhibits within the record before making its decision;
- 3) The court refused to allow argument and supporting evidence that was within the record regarding false and misleading representations to the court by Farmers regarding payment of claims;
- 4) The court acknowledged at least one genuine issue of material fact remained and still granted summary judgment dismissal to Farmers; and
- 5) The court had a personal prejudice against counsel for the Silvers because of a prior reversal by the Court of Appeals, Division III, in a unanimous, Published Opinion on claims within the same case.

On summary judgment, the Silvers were not allowed to present specific facts and evidence supporting their claims as this judge was focused solely on a dollar amount (which was and is contained in the record) and not on any of the evidence and supporting testimony and documents establishing genuine issues for trial.

Liability is clear in this matter, as are damages resulting from the following failures by Farmers:

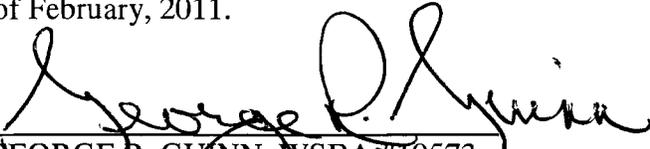
1. Failure to pay all contractors;
2. Failure to defend the Silvers after being put on notice;
3. Failure to close the claim;
4. Cancelling the Silvers' policy;
5. Failure to complete repairs;
6. Failure to notify Silvers of settlement deals made, leaving them to believe they were liable for damages (ServiceMaster);
7. Failure to reimburse the Silvers for loss;
8. Failure to reimburse the Silvers for their attorney fees.

The Silvers are respectfully requesting this Court set aside the trial court's Amended Order (CP at 503-504) granting summary judgment dismissal to Farmers on all of the Silvers remaining claims based on the argument and evidence outlined above.

Additionally, pursuant to rule 18.1 of the Rules of Appellate

Procedure, the Silvers respectfully request to recover their attorney fees and costs for the necessity of this appeal.

DATED this 3 day of February, 2011.



GEORGE R. GUINN, WSBA #19573
Attorney for Third-party Plaintiffs
Thomas J. and Robin G. Silver
George R. Guinn, P.S.
605 East Holland Avenue, Suite 113
Spokane, WA 99218
509-464-2410
509-464-2412 fax
grguinn@georgerguinn.com
angela@georgerguinn.com